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East Bay Municipal Utility District Series

Robert B. Maddow

WATER SUPPLY, WATER RIGHTS AND OTHER LEGAL ISSUES AT THE EAST BAY MUNICIPAL UTILITY DISTRICT, 1972-1993

With an Introduction by
Gayle B. Montgomery

Interviews Conducted by
Germaine LaBerge
in 1997

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Since 1954 the Regional Oral History Office has been interviewing leading participants in or well-placed witnesses to major events in the development of northern California, the West, and the nation. Oral history is a method of collecting historical information through tape-recorded interviews between a narrator with firsthand knowledge of historically significant events and a well-informed interviewer, with the goal of preserving substantive additions to the historical record. The tape recording is transcribed, lightly edited for continuity and clarity, and reviewed by the interviewee. The corrected manuscript is indexed, bound with photographs and illustrative materials, and placed in The Bancroft Library at the University of California, Berkeley, and in other research collections for scholarly use. Because it is primary material, oral history is not intended to present the final, verified, or complete narrative of events. It is a spoken account, offered by the interviewee in response to questioning, and as such it is reflective, partisan, deeply involved, and irreplaceable.

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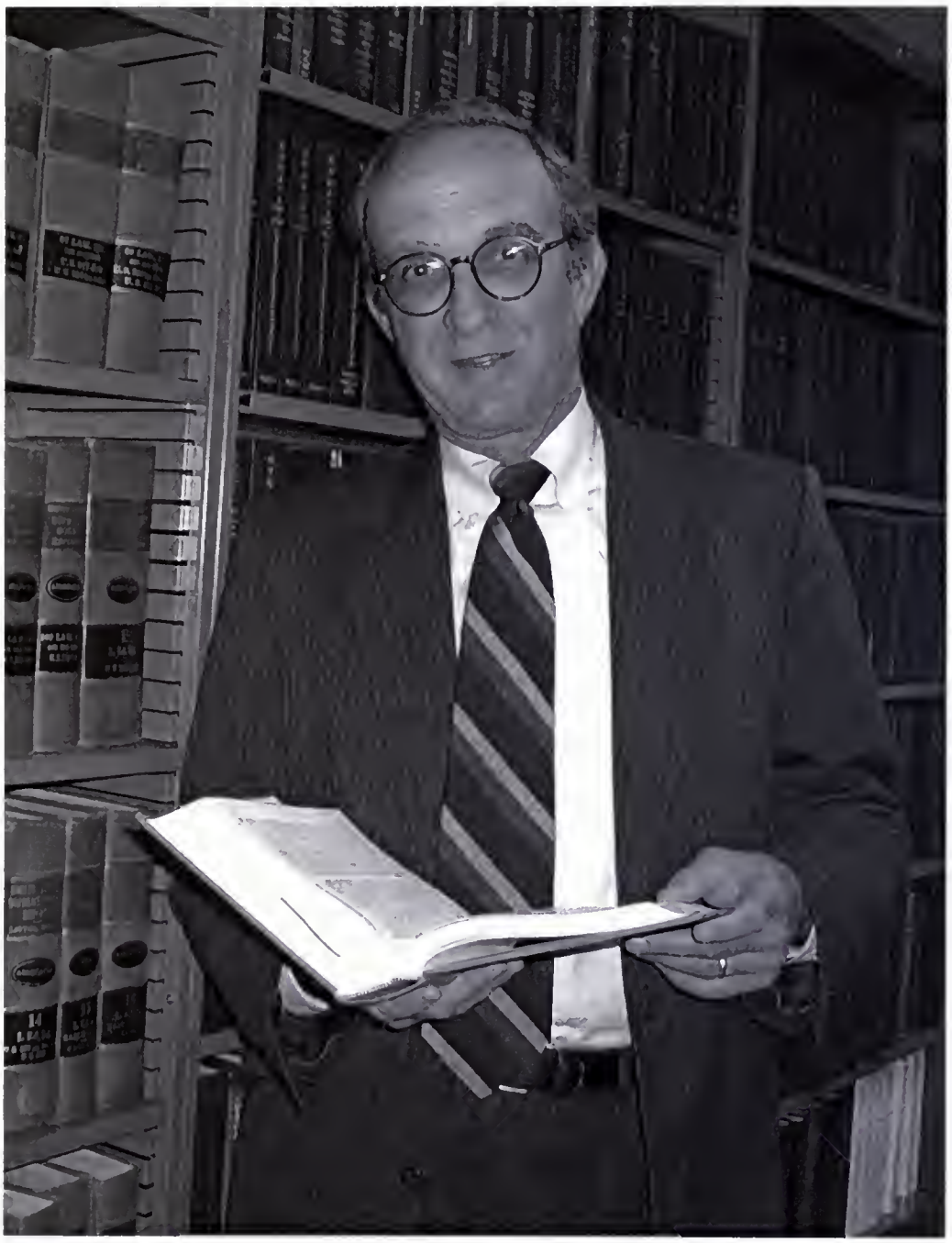

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PREFACE by Frank E. Howard

For more than seventy years the General Counsel of the East Bay Municipal Utility District has faced issues that have shaped the legal history of California. The role of EBMUD attorneys in securing and protecting water rights has added important chapters in the annals of Wetsern water law. In addition to the accomplishments in water resource development and protection, the water district's attorneys have been involved in landmark decisions in many areas of public law, including eminent domain, taxation, land use planning, public contracts, and municipal financing. With the creation of the Special District and construction of wastewater treatment facilities, EBMUD lawyers began to face new legal issues in areas which subsequently became the environmental law development of the sixties.

The period from 1953 to 1973 brought major annexations to the EBMUD service area. This triggered needs for major facility expansions and a supplemental water supply. The "flip side" of these needs were new legal challenges as well as increased state and federal regulatory requirements. The seventies and eighties brought new legal issues in public employment, municipal financing, and environmental control and challenge.

In 1995, the district asked The Bancroft Library of the University of California, Berkeley, to conduct an oral history series of the General Counsel's Office. The Regional Oral History Office proposed to interview leading lawyers for the district to record and preserve their memories. The primary sources available for the project, Harold Raines, John B. Reilley, and Robert Maddow, enjoyed careers which spanned almost the entire seventy-year history of EBMUD. They were three of only four attorneys who led the legal department since its formation in 1923. By recording the personal recollections and anecdotal observations of those directly involved in the major legal and legislative contests of the district, the written records will be amplified and strengthened to the benefit of future managements, historians, and the public in general.

Frank E. Howard
Attorney at Law

Walnut Creek, California
April 11, 1997

INTRODUCTION by Gayle B. Montgomery

In those days, the district's lawyers were almost as far-ranging as its engineers, with court battles here, there, everywhere, and seemingly all at once.

John Wesley Noble
Its name was M.U.D.
On the beginnings of the East Bay Municipal Utility District

When Bob Maddow was named general counsel of EBMUD in 1984, there truly were "court battles here, there, everywhere, and seemingly all at once." It seemed that the District was under attack from every direction.

I had met Maddow when I came to work as a public information officer for EBMUD the previous year, and immediately was struck by his knowledge of water law, water history, water tradition, and how all affected the District.

By the time he left EBMUD a decade later, I would regard him as the conscience of the water District.

He had a quiet unassuming manner that masked his inner strength. It was Maddow who showed me the ways of water law, and how the laws affect the Mokelumne River that is the lifeline of the East Bay Municipal Utility District, and how the river, in turn, affects the law. He had an unerring sense of what was the "right" thing to do, and never let expediency interfere with the course he chose.

I came to see how fortunate the people of the East Bay were to have had the pioneer water planners who went to the Sierra to find the high-quality water that has meant so much to the people of Alameda and Contra Costa Counties, but I also realized that those early water providers would have been totally lost in the complex tangle of water regulation in the 1980s and 1990s. It was then that I knew that while the vision of early leaders pointed EBMUD in the right direction, it would be the Bob Maddows who would make it work.

There was little room for error in those years that I worked with General Counsel Maddow. There were more than 40 agencies in Sacramento County alone that were working to keep EBMUD from obtaining water from the American River through a contract signed with the Bureau of Reclamation in 1970. He was a tireless leader in putting together the legal battle plan in hearings before the State Water Resources Control Board and later in

Superior Court. His legal staff could match any public agency anywhere. His workdays often lasted late into the evening and his work week included weekends.

Yet, he always had time and patience to explain complicated legal actions to a public information officer who had to go out in front of television cameras, or to enjoy a good political story with this former newspaperman.

Bob Maddow is a water expert and a legal scholar, the kind of a man who sometimes is defined simply, but in the greatest sense, as a "pro." He never was ambivalent about where his duties lay, nor was there any doubt that he would complete whatever task he set about doing. But there is much more to him than that. Despite his devotion to his profession, he always found time for his family and his community. He always would work harder himself to make life easier for someone else.

His strength and integrity is far greater than one has come to expect in public service, a strength he assuredly has carried into private law practice.

I am proud to call Bob Maddow a long-time colleague and a trusted friend.

Gayle B. Montgomery,
former political editor,
The Oakland Tribune

December 1998

INTERVIEW HISTORY by Germaine LaBerge

The Regional Oral History Office (ROHO) has long been interested in California water issues. In 1991, the East Bay Municipal Utility District (EBMUD) funded a full life oral history with Walter McLean, a civil engineer of the district who specialized in water resources engineering. We were delighted then when a group of retired EBMUD attorneys, engineers, and managers, approached ROHO to suggest documenting the history of water rights litigation and legislation from the standpoint of EBMUD. The idea was to begin with interviews of Harold Raines, John B. Reilley, and Robert Maddow, all former general counsel of the district. The EBMUD Board of Directors accepted a proposal drafted by Frank Howard of the Friends of Western Water Law, and with the board's funding, we began to document the work of EBMUD's general counsel's office. Robert Maddow is the third and final interviewee in this series.

A graduate of Stanford University (1964) and Hastings College of the Law (1967), Robert Maddow came to EBMUD in 1972, fresh from five years in the United States Air Force. In the oral history which follows, Maddow describes how then General Counsel Jack Reilley interviewed and offered him a job in the legal department--an amusing anecdote not recorded anywhere else in the annals of EBMUD. It was the beginning of a friendship and close collegial relationship, as Jack and Bob worked tirelessly in the interests of providing the highest quality water to the customers of the district. When Bob Maddow was appointed general counsel in 1984, the controversy over the rights to the American River water was heating up. His oral history documents the legal and environmental issues involved, including years-long litigation (*EDF v. EBMUD*). Maddow also discusses how the district responded to drought, incorporated affirmative action policies in hiring, and oversaw safe recreational uses of the reservoirs. Throughout his tenure, Bob represented the East Bay Municipal Utility District with integrity, intelligence, perseverance, and that rarest of qualities--humour.

Six interviews were recorded (twelve hours) from February to June 1997, either at The Bancroft Library or at the Law Offices of Bold, Polisner, Maddow, Nelson & Judson in Walnut Creek. The tapes were transcribed and lightly edited at ROHO, and sent to the interviewee for his approval. Because his narrative was clear and eloquent, little editing was necessary. Careful and considerate, Bob spent time checking facts and expanding on his thoughts and descriptions. His additions and changes enrich the completed volume.

In preparation for this interview , I consulted background material at the Water Resources Center Archives on the Berkeley campus; spoke with Bob's former colleagues; culled through files at the EBMUD Records Office

at the Oakland headquarters. I prepared a draft outline of topics--one which Bob himself expanded with characteristic thoughtfulness and thoroughness. The resulting memoir follows.

As I write this interview history, we are mourning the untimely death of Frank Howard (March 2003), a loss to all those who knew him. The Regional Oral History Office greatly appreciates the impetus Frank gave to this project, and the introduction written from the vantage point of a retired member of EBMUD's legal department. Many thanks to the East Bay Municipal Utility District for funding this series. And more thanks to Gayle Montgomery, former political editor of the *Oakland Tribune*, for the fine personal introduction to Bob Maddow's oral history.

The Regional Oral History Office was established in 1954 to augment through tape-recorded memoirs the Library's materials on the history of California and the West. Copies of all interviews are available for research use in The Bancroft Library and in the UCLA Department of Special Collections. The office is under the direction of Richard Cándida Smith, and the administrative direction of Charles B. Faulhaber, The James D. Hart Director of The Bancroft Library, at the University of California, Berkeley.

Germaine LaBerge,
Interviewer/Editor

April 2003
Regional Oral History Office
The Bancroft Library
University of California, Berkeley

Regional Oral History Office
Room 486 The Bancroft Library

University of California
Berkeley, California 94720

BIOGRAPHICAL INFORMATION

(Please write clearly. Use black ink.)

Your full name ROBERT B. MADDOW

Date of birth 5/14/43 Birthplace PASSAIC, NEW JERSEY

Father's full name BERNARD MADDOW

Occupation RETIRED Birthplace BRONX, N.Y.

Mother's full name GERTRUDE (TRUDY) S. MADDOW

Occupation RETIRED Birthplace CLIFTON, N.J.

Your spouse ELAINE G. MADDOW

Occupation PROGRAM COORDINATOR Birthplace ST JOHN'S, NEWFOUNDLAND, CANADA

Your children DAVID ROBERT MADDOW - BORN 7/11/69 - INGLEWOOD, CA; RACHEL ANNE MADDOW - BORN 4/1/73 - HAYWARD, CA

Where did you grow up? NEW JERSEY THRU AGE 3; ARIZONA - 3-11; SAN DIEGO FOR JR HI SCHOOL & HI SCHOOL

Present community CASTRO VALLEY

Education B.A., POLITICAL SCIENCE, STANFORD UNIV., 1964
J.D, HASTINGS COLLEGE OF LAW (UNIV. OF CALIF.), 1967

Occupation(s) ATTORNEY

Areas of expertise WATER LAW, GOVERNMENT LAW

Other interests or activities PUBLIC POLICY ISSUES, MOVIES, MUSIC, SPORTS

Organizations in which you are active ASSOC. OF CALIF. WATER AGENCIES, VARIOUS BAR GROUPS

INTERVIEW WITH ROBERT MADDOW

I CHILDHOOD, EDUCATION AND MILITARY SERVICE

[Interview 1: February 3, 1997] ##[1]
[The Bancroft Library and law offices of Bold, Polisner, Maddow, Nelson, and Judson]

Parents and Sister

LaBerge: This is February 3, 1997, and I'm interviewing Robert Maddow. We always like to start from the very beginning, so why don't you tell me the circumstances of your birth?

Maddow: I was born in May of 1943 in New Jersey. I guess that would make me a war [World War II] baby. My parents were both longtime residents of New Jersey. My father was actually born in New York and my mother in New Jersey. They were both the children of immigrant families, my father's family having come from Russia and my mother's family from Holland.

LaBerge: Can you give me their names?

Maddow: My father is Bernard Maddow; he has no middle name. He goes by Bernie. And my mother is Gertrude Smits Maddow; she goes by Trudy. They were both working in the New Jersey area during the war. My father was involved in aircraft instruments, bomb sights

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[1]## This symbol indicates that a tape or tape segment has begun or ended. A guide to the tapes follows the transcript.

and things like that, and his was a critical skill field during the war, and so he remained in the war industry as opposed to in the military service throughout the entire period of World War II. He before that had worked as a watch repairman; he worked for a company called Swartchild, which I can't spell. But he had been a salesman and had also worked at the work of repairing time pieces, and that's kind of how he developed the skills necessary for work with aircraft instruments.

He continued with that line of work after World War II. In 1946, my parents decided to leave the East and migrate West. They had a 1936 Dodge with which they pulled a trailer across the country. My sister would have been about seven at the time, and I turned three en route from New Jersey to Arizona, which was our ultimate destination. We settled there in Tucson, Arizona, in 1946.

LaBerge: You mentioned your sister; what's her name?

Maddow: Her name is Cheryl. She's about four years older than I am. She got married right after high school. We lived in San Diego by this time, and during high school, she had started dating a fellow who was a little older, who was from a school nearby. While she was in high school, he was in effect finishing what we would today call a junior college program. They were married when she was just eighteen. She worked for many years as a letter carrier for the post office and eventually ended up quite a high official in the union with the post office, and now is employed actually by the AFL-CIO, but her work is with the American Red Cross. As a matter of fact, today she is one of the people involved in the disaster relief effort. She's up at Mather Air Force Base in Sacramento, where she's one of the disaster relief coordinators.

Actually, her job is kind of between the labor movement and the Red Cross in regard to coordination of such things as blood drives and volunteer efforts, et cetera. So she has done a lot of very interesting things and has been out on every type of disaster imaginable. She has been in this area for the

earthquake and the fire, and been to Sacramento twice for floods, and went to Kauai after the hurricane, and went to one of the--I've forgotten which one of the islands in the Caribbean after another hurricane, and she's just done a lot of interesting things like that. She's my only sibling.

Growing up in Tucson

LaBerge: Okay. And you came to Tucson when you were three. Do you remember that?

Maddow: I remember bits and pieces about Tucson. I have very little recollection--I have essentially no recollection of New Jersey before we left, except very faint things about playing with my grandparents and those kinds of things, very faint memories. And then the family really kind of broke away when we went to Arizona, and so really that New Jersey stuff is all behind me. I remember little things about the first few years we lived in Arizona. My father's first job in the immediate postwar period, he went into watchmaking business, and he worked for a jeweler. He had a shop down on the old plaza in what was then the heart of Tucson; now Tucson has grown so large that you probably can't even find it any more. But it was right by the railroad depot, and I remember going down to my father's shop and being taken over to the area of the railroad depot where they were filming a movie called Fury with Barbara Stanwyck. And I still remember after every scene, I remember a man hollering, "Get Miss Stanwyck a drink!" [laughter] I don't remember any details other than that.

But I also remember that my father worked with a wonderful family there, a man who had been in this country from Mexico not too many years and had a good little jewelry business there. He loved my father's capabilities, because my father understood watches and fine jewelry, and particularly knew how to deal with gold, and this man used to use my father to get involved with the

purchases that he made. And some of these were made in Mexico, and it was all legal, there wasn't anything illicit going on; but what was interesting to me was that a couple of times, my family would all go with my father when we'd go on these visits. And I remember going to a place that was actually hewed out of the side of a hill. It was a room--it could be 110 degrees outside in the streets of Nogales, but when you went to this place where this gold merchant had his supplies that he was selling to my father's employer, it was cool, because it was in solid rock. I was probably four at the time, but I can remember that room. It's a strange little thing that sticks with me.

But we lived in Arizona then from 1946 to 1954.

LaBerge: Can I back up a minute?

Maddow: Of course.

LaBerge: What caused your parents to go to Arizona?

Maddow: My mother was suffering with asthma, and one of the suggestions made to her was that the desert might be better for her. In the long run, it turned out that it was not. She was one of those people for whom the desert was not the right answer, and ended up eight years later going to San Diego, and she's not had any asthma problems to speak of since she's been in San Diego. Which is a little bit out of the ordinary with regard to asthma, but apparently, the case is not totally unique. But that's what the experience was.

My parents both wanted to get away from the New Jersey experience, I think. It was a big move for them, but something that I think they were really ready to make in 1946. So they had planned it for quite some time. In the immediate aftermath of the war, of course, a lot of the industries--my father had worked at Bendix Industries, that's the wartime employer, and of course they scaled back a lot by 1946. So they knew what was coming, and they planned to make this move and purchased this car and trailer, and made the move.

We moved in the trailer, and then shortly thereafter, my parents rented a home, an old red brick house on Columbus Boulevard in sort of north Tucson, not very far from Davis Monthan Air Force Base. I remember living on--Columbus Boulevard was a dirt road, and there were no real storm drains in that area, so every house had a little bridge over a drainage ditch to get to the house. Perhaps my first memory that relates to anything having to do with water was every year when it would rain in Tucson--which was a big event--you would get what was in effect a little flash flooding, because the drainage direction in our area was away from the air base, which had these huge concrete runways. And so we'd get this big flash of water going by.

But that's where I started elementary school. My sister went pretty much all through elementary school while we lived on Columbus, although she'd started before, of course; she was seven years old when we made the move, but we went to--golly, what was the name of that school? Davidson School. They had no kindergarten; I guess I was there in first, second, and third grades, and then my parents bought a home on the other side of town in a new subdivision called Mission Manor. It was called Mission because the property that the developer had purchased adjoined a portion of the Pima Indian reservation in the location where they have a mission that's very famous. It's called San Xavier del Bac [spells]. It used to be called the White Dove of the Desert, and it was very famous because it had two towers out in front, one of which had a dome and the other of which had a flat top. And the reason, by legend, for only one of the domes having been finished is that supposedly one of the Indians who was working on the first dome fell to his death, and so the Indians wouldn't go up and build another dome. But it's a magnificent mission, and it's still very much sort of a tourist attraction.

We lived in the seventh house in this subdivision, seventh house to be finished. When we first moved there, we could see the mission out the back of our house, but a few months later,

there were hundreds of houses between us and there, and there wasn't much of a view.

I finished elementary school there, actually skipped a grade I guess there, so started off in the fourth grade and they moved me into the fifth. Just as I was finishing sixth grade and my sister finishing ninth grade, on the same day we got in the car and drove to San Diego and moved to San Diego.

LaBerge: And was that also for your mother's health?

Maddow: Primarily. The last couple of years that we were there, she really struggled with the asthma, to the point where there were times when she really had trouble breathing, had to take injections of adrenaline. She had to learn to inject herself at one point; my father, of course, would also be able to do it. She was really struggling from a health perspective.

My father was working back in the aerospace industry--we didn't call it that in those days; the airplane industry in those days. He was working at a company called Grand Central, which was doing instrument work on jet bombers for the U.S. Air Force, and so all these great big bombers called B-47s would come into the Tucson Municipal Airport, which is where Grand Central had its location. It was right across the street from the place I went to school. My father would work on their instrumentation.

But in 1953 in the summer, we went out to San Diego for a vacation, and my mother really enjoyed and thrived being in that beach weather, and so they began immediately starting to try and figure a way to make the move, and my father began to look into job opportunities. My mother at this time was working at Hughes Aircraft. One thing led to another, and my father was able to line up a job at Convair in San Diego, which was a big defense company.

And so we moved to San Diego in 1954, and a few months later moved to a community called Pacific Beach, which is just north of the Mission Bay area, just south of La Jolla in San Diego. My

parents have lived--they lived there for I guess seven years, and then in 1961 while I was away at college, they moved to an area just east of there, just up the hill from Mission Bay, and they're still there. They're both eighty-one years old now.

Childhood Pastimes, Interests, Hobbies

LaBerge: Wow. Tell me what kinds of things you liked to do as a boy.

Maddow: Play baseball. I can remember in the summer when we lived in the Mission Manor subdivision, so that would have been I guess like three summers there, the other kids in the neighborhood and I would be outside all day, every day, fooling around, usually involving playing baseball. We didn't have a real field, but we kind of cleared off an area and put all the rocks over to the side, and the subdivider had his corporation yard right near there and they let us do it. We would go out there and play every variety of baseball that you could with a small number of kids.

I remember also that my sister, who was a wonderful athlete, she was a little older than all the boys who I hung around with. She was a real tomboy; she used to give us a very hard time. She taught herself one summer to be a switch-hitter, and she prided herself on the fact that she could hit the ball farther left-handed than any of we little twerps could right-handed; we were all right-handed.

I also remember sort of wide-open spaces, because in south Tucson where we lived, there had not been a lot of development yet, and a kid could get on a bike and go forever on dirt roads, and sort of be out in the middle of the desert. So we learned what it was like to be out there. You had a BB gun, and you'd point at things, and there were always kids who would have firecrackers, and none of us ever--we just kind of grew up with

them. They weren't something awful, because we had learned to be careful and nobody ever hurt themselves.

There was sort of an eroded--back then we called it an arroyo; I don't know what you'd call it out here--like a creekbed where when it rained, you could get a lot of water, but then it would just kind of peter out in the desert. But it left these eroded gullies and things like that, and for kids who wanted to roam around out in the desert, that was fun. It was like having your own little canyons, little forts and things like that. So as little kids, we always did that.

I remember all summer running around in shorts and shoes and getting just baked in the sun. We never thought--none of us thought to wear a hat, and nobody wore sunglasses or anything like that.

In 1954 when we moved to San Diego, we went to see a movie. I couldn't read the credits, and my mother immediately said, "There's something wrong with your eyes," took me to an eye doctor, and he said, "You really do have a nearsightedness problem." He began to talk to me and to my mother about it, and he became convinced that my nearsightedness was reinforced or exacerbated by being outside all day in the sun and probably squinting. He told me that what I had been doing as a little kid probably hastened the time I would have to start wearing glasses, so there I was at age eleven, having to wear my first pair of glasses because of too much sunshine as a nine-year-old.

My father used to like to get in the car and drive someplace on the weekend, and in those days I used to hate it, and now, I look back on it and I still remember some of the things that we would go to visit in Arizona, which is a wonderful place to go and poke around. And now, I've inherited that trait. My father never goes anywhere any more; he's very reclusive. But I love to get in the car and just go someplace, and that's one of the advantages of living here, is because within four hours, you have so many interesting places.

But we would go to the old copper mining regions, or to the areas where there were Indian ruins, or out to--sometimes we'd go pretty great distances. We went to the Grand Canyon, and to Oak Creek Canyon, which I still remember when I was a little kid, and I didn't go back again until last year. And I have to say, my memories were better than my vision of it this time. But I remember doing things like that. We used to go up into the mountains right near Tucson to a place called Sabino Canyon [spells], which was an old place that the Indians had used during the summers, because there was always water there. Sabino Canyon had a recreation area that I remember fairly vividly from when I was a little kid. You could get there in a couple of hours drive, and in the baking heat of Tucson summers, it was one of the few places you could go for relief. Nobody had air conditioners in those days. If you were lucky, you had a swamp cooler, an evaporative cooler, but they never really did the job. Probably contributed to my mother's asthma, as a matter of fact; that's what we were told.

But anyway, those were the kinds of things that we did.

I also was very bookish.

LaBerge: That's what I wondered, if you liked to read.

Maddow: I did. By the time I had finished junior high school, I think I had read every book in the San Diego Public Library with the Dewey Decimal System number of 917.54, which means it was about World War II. I had grown up with both parents working for defense contractors, I saw airplanes all the time in Tucson. My father worked on B-47s. Every B-47 ever made flew right over my sixth-grade classroom at an altitude of about 400 feet or something. And for a kid who was fascinated with airplanes, Tucson was a wonderful place, because Davis Monthan Air Force Base was kind of the graveyard for the thousands of military planes that were no longer needed after the war. Many of them were just stored, and then they had places where they sort of, I don't know, salvaged parts of them and scrapped the rest. And so

there were always airplanes flying around, and that kind of became a fascination for me.

And then, of course, we moved to San Diego, and on the weekends, the navy would have open house on ships. My dad got interested in that, and then I could just take the bus down there. So I got interested in that.

So I began to read about the war, and read everything I could get my hands on in those days. I don't know why, but that just was a point of fascination for me.

LaBerge: And then you later joined the air force. Did that have anything to do with that?

Maddow: No, and that's another story, which I'll be happy to tell you. But basically, what I was trying to do when I joined the air force, by that time, I had graduated from law school, and I didn't really want to carry a rifle in the Mekong Delta, so I thought that it was an alternative to being drafted. I was able to get into an officer training program, and that's how I ended up with the air force. But I never flew anything more exotic than a desk in the air force. [laughter]

The other fascination for me in those days, I have to say, was baseball. I loved everything about baseball. Tucson was the spring training home of the Cleveland Indians. There was a ballpark there called Hy Corbett Field [spells]. It's still there; it's still where the Indians train. And we used to go there sometimes in the summer. I still remember my sister being stepped on by Lou Boudreau at the time he was both the manager and the shortstop for the Cleveland Indians.

But she formed a great fascination for the New York Giants who trained up the road in Phoenix and used to come down and play the Indians, and she really liked the Giants. And so I, of course, had to become a Brooklyn Dodgers fan, just because sibling rivalries and all that. So we used to talk about and argue about baseball all the time. And we played it a lot.

And I used to like to listen to the radio broadcasts of the Tucson Cowboys, who were the minor league team that played in Hy Corbett during most of the year. I can still remember listening to those broadcasts, which in those days, of course, were interesting because the announcer didn't have a fancy press box or something; he pretty much sat up at the top of the stadium. If we went to the game, I can remember seeing where he sat. He had a little box around him; he wasn't completely out in the open. But he was really part of the game, so you got all that noise and everything.

But then when the team would go to play in another city, they couldn't afford to send the radio announcer, so he would stay back in Tucson and get the wire service or ticker tape accounts of what was going on in the game, and he would do what was called a re-creation. They had a tape or something of crowd noise which he could turn up if he thought he should, and to make the sound of the bat and the ball I think he hit two sticks together or something. And I can remember listening to re-created games when I was a little kid and thinking that that was just great, to think that somebody could be giving us that wonderful word picture when they weren't even there.

But those were big memories, big sort of focus points for me, being a kid in Arizona, I guess.

Junior High and High School in San Diego

LaBerge: And then when you were in San Diego, did you play in school, or did I read that you played basketball?

Maddow: I played a little baseball and a little basketball. I wasn't very good at either one. The only high school sport I played was basketball. I fooled around with the track team for a couple of years, but I wasn't really all that interested, but I did it, because I had a basketball coach who thought it would be a good

idea for all of us to do that for conditioning. I wasn't nearly good enough to play on our high school baseball team; we had an excellent team in those days, and I was a cut below all those fellows. But I played in kind of an American Legion program, and Colt League, and things like that. I wasn't very good, but I hung in there, and I had a lot of fun. I hung around with the guys with whom I was friendly. We all were involved in that.

One of our big attractions in junior high school in particular was basketball, though. There was a recreation center just adjacent to our junior high school, where four or five of my junior high classmates and I used to spend seems like every waking hour. We just played basketball a whole lot there, and once again, we weren't very good, but we were all about the same degree of ability or lack of ability. And had a lot of fun doing that. It was just an activity we all got really into.

Several of us began to play tennis in those days. There were three other guys that I played a fair amount of tennis--one of them actually got to be pretty good. He was trying to get as good as he could, because there was a girl in our class who was a nationally ranked tennis player who actually won Wimbledon singles in 1962, Karen Hantze. This guy just kind of doted on her; she didn't have very much to do with him, but he figured that maybe if he got good enough, some day she'd notice him. He never quite got that good. [laughter] It's funny how those things come back.

I had a kind of a flashback to those days and that old gym the other day. My wife and I were going to a movie in Walnut Creek, and we went to Mel's Diner to have a hamburger beforehand, and up on the wall of Mel's Diner, they have a bunch of signs from old products from the forties and fifties and sixties. A lot of them were for a soft drink called Grapette, and I can remember drinking Grapette by the bottle when we were playing basketball in the gym. You'd pay a dime, and it was one of those old Coke machines with the glass bottles hanging up by their neck, and you'd slide them out. It was always a challenge to see if you could get out two for one dime; you never could. But I

can remember gallons of Grapette and many hours of basketball, and my mother going nuts whenever I'd break my glasses playing basketball, which was a frequent occurrence. But those were the --San Diego was a wonderful place to grow up, because we had a beach, we had Mission Bay, and a lot of activities that were safe and easily accessible. I enjoyed those years of junior high school and high school very much.

LaBerge: Did you have any favorite school subjects? Or did you like school?

Maddow: I did like school, and I was a good student, and I got involved in a lot of things. And you'll laugh when you hear this, and maybe I'm saying it more in hindsight than anything else, but one of the classes that probably meant the most to me in looking back then in terms of forming my study habits, was Latin. I took Latin from--there was a brother and sister teaching team at that school, Miss Shepherd and Mr. Shepherd, both spinsters, both old, very old-fashioned--they almost sounded like they were English but they weren't, but they had this very almost stentorian style of speaking. I took Latin from Miss Shepherd and it taught me English which I took from Mr. Shepherd. I learned something about how English works by studying Latin. I learned that I really had to study. In hindsight, it was very useful. And yet, I also remember funny things about it and all. But that had a big impact on me.

I had to work hard in mathematics, and I thought I was good at it, but I wasn't as good as I thought. [laughter] But I did enjoy--in those days, I thought I was enjoying math. They had good math teachers, and I think that was a reflection of them more than it was of my abilities or anything.

I have positive recollections of my science classes in both junior high school and high school, and particularly in high school my chemistry class from Miss Perry. I really enjoyed the chemistry program, and I even went one summer and took an organic chemistry laboratory, where I worked all summer on a project involving trying to produce plastics. I remember we had to work

with a lot of acid. The laboratory tables hit me about mid-thigh, and every pair of pants I owned had holes in it right there from the acid that we one way or another would splatter on the laboratory table.

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Maddow: I was president of my class in my junior and senior year. And I worked pretty hard at that. I was also involved in a service club called the Key Club, which was kind of a scholastic version of Kiwanis. The Kiwanis were a very important service organization in our community. Frankly, the kids who were kind of the leaders of our school became members of the Key Club. We did a lot of things together, activities involving school and things outside the school. I remember we had a huge canned food drive each year, and we ended up taking these two very large truckloads of canned food down to Mexico, down to Tijuana. This was in my junior year--we did it both my junior year and my senior year.

In my junior year, I remember it was this rainy, rainy day, being in the back of this truck and seeing these kids from Tijuana, many of whom had no shoes, and--Tijuana was pretty sad in those days. It's even sadder now. But that was a real education for a lot of us.

And those Key Club things were useful in terms of beginning to develop a kind of a service ethic, because when you're in high school, you're interested in what's going on around you, and you look like one of the crowd, and is the girl you're interested in going to pay any attention to you that week or whatever. To have something like the Key Club that gets you out of that mold and says, "Hey, there's another world out there that you ought to be thinking about," that was very useful, I thought.

And then finally, one year I got involved in the debate club or society, and our topic for that year was foreign aid. We had to go off and debate with students from other schools and all. Those of us who were involved in debate went off and participated

in a model United Nations out at San Diego State College--now I guess it's San Diego State University. Things like that began to become a part of my life when I was in high school.

It was a pretty diverse existence. I was young, because I had skipped a grade. I was sort of one of the people who I guess became one of the leaders of--

LaBerge: Well, I guess, if you were president two years in a row, and--

Maddow: Maybe it was because nobody else wanted to do it. That's not quite true, because there were always elections and that sort of thing. But I don't know. I think I had my head screwed on reasonably decently well, and I guess was less of a threat than the other guy or some such thing, I don't know.

Influences

LaBerge: Any influences? Uncles, aunts, teachers, your sister?

Maddow: Well, uncles and aunts not so much, because we were the only ones in the family who had gone West. For a while when we lived up in Tucson, my grandfather lived with us, but that wasn't too many years. I don't remember--I remember him as a strong, domineering grandparent, but I don't remember many details beyond that. I can't say I really had a closeness to any of my grandparents.

In terms of influences when I was going through in particular in the junior high and high school years, there were some people who had influences on me, and it's quite a range. There were coaches. I really had a great deal of admiration for some of the coaches I knew. There were business people, because through the Key Club or through parents of people I went to school with, I got to know some of the business people in town. For example, one of my friends was the son of a man who was an executive with the telephone company, and he was a guy who just

had a way of always making time for young people. That was for his own son, but also for young people in general. I remember thinking that that made him a pretty special guy. That was Mr. Taylor.

And then there were a couple of families that I had gotten to know through junior high school, but as high school students, we went off to different high schools, and yet I stayed fairly close to some of those families. There was a fellow who I stayed friends with even though we were in different schools. His father, whose name was Ed Seipel [spells]--he's dead now--but he was a real--a person with very high ethical and moral standards who was somebody that kids kind of gravitated around, and that--I always liked to be around Mr. Seipel. He worked for Bekins Moving Company. I mean, he wasn't a mover and shaker or anything like that--oh, bad choice of words. [laughter] But I mean, he wasn't a captain of industry or anything like that; he was just an ordinary guy, didn't make very much money. But he was a real special guy, and I remember him very vividly.

And then through high school, I became close friends with a fellow named John Wester who had grown up in Alaska. His father was with a company that owned a big hotel up there, and then the hotel got bought out by a larger company and they moved him down to San Diego. John's father was--he didn't say very much, but you just knew that when he spoke, you needed to listen, because here was a guy who had achieved a great deal in his life in a number of ways, and he was sort of stern and unapproachable, but he wasn't tough on the kids, either his own kids or the friends of his kids. He wasn't real outgoing like Mr. Taylor was, but when he talked to us, when we were at their house or something--and we were at their house a lot, because they had a pool; they were the only people we knew who had a swimming pool--you listened to Mr. Wester. If he started talking to you about going off to college and getting an education and what you should be thinking about in that regard, you listened. Because Mr. Wester, he probably knew some things.

So people like that who I remember vividly. But just as vividly, perhaps even more vividly, I remember a teacher. A math teacher named Mr. Stout. One of my best friends in those days was a girl named Julie Eiland, and Julie's older brother Mike had been a classmate of my sister's. Both my sister and Mike had had Mr. Stout, and then Julie and I came along three years later and had Mr. Stout. He was a Southerner; he had a real kind of a drawl in the way he talked. He was a pretty good math teacher. He was a nice guy, and we all kind of looked up to him. We always knew that if you were--if the kids were out knocking around on a Friday night and somebody had a flat tire or something, we all knew where Mr. Stout lived, and he'd help. He was the kind of guy who, if kids needed somebody to talk to, they could always go and talk to Mr. Stout. And if you just wanted to go and talk to him because he was fun to talk to, that was okay too. I remember people like that very vividly.

College Choices

LaBerge: How did you decide to go to Stanford, and where else did you apply? Did you always know you were going to go to college?

Maddow: Pretty much. See, my sister got married right out of high school. She was very bright, and probably made a mistake in getting married as young as she did, in hindsight. I mean, she would say that; I'm not saying that. She'd say that, because there were a lot of things beyond what she did in her life--she's had a good life. She's divorced now, she has two grown kids and three grandchildren. She's done wonderful things in her life, done a lot of interesting things. But I think that she probably feels that her horizons were smaller than they could have been, had she not married as young as she did.

In my case, it was just--I was going to college. I mean, there just wasn't too much doubt about it.

LaBerge: In your mind, and in your parents'?

Maddow: I think so. Certainly in mine, and I think my parents had a high expectation, let me put it that way. So when I would talk about going to college, there really wasn't much question.

In terms of going to Stanford or other places, we had gone on a vacation up towards the north, and I'd seen Stanford. I didn't know anybody there really. I guess I did know one guy who'd gone there, but I didn't--there wasn't anybody in my family through whom I really learned very much about colleges. But I'd done a lot of reading, and I'd done a lot of talking to students from years ahead of me in high school, and to faculty people, and I had decided that Stanford was probably the best school in California, and so I figured, by golly, I'm going to take a shot at that.

And somebody, one of my teachers, I think, told me--I think it was Mr. Stout, now that I think about it--who said, "Well, one of the things you ought to think about is aiming at the level of school you think would be your ideal, and applying there. And aiming at the level of school that you think is right where you're probably best situated, and making sure you have a fallback." And so my ideal was Stanford. The place to which I thought in those days that I was perfectly focused was this place, Berkeley. And my fallback was San Diego State.

And I still remember as a senior in high school how many kids would sign other kids' yearbooks--we called them annuals in those days--sign somebody else's annual with "SYAS"--"See you at State." [laughter] Most of the kids from my class who went to college I think did go to State.

But I decided that Stanford was an ideal, and you see, this was the late fifties. People were starting to set goals for America that I kind of latched onto, like the space program, which was the particular thing that had kind of caught my attention by this time. We were being challenged, the San Diego industries were so focused. Convair had created what was called-

-no, wait a minute--Convair became General Dynamics, and General Dynamics had this program of building rockets. They built something called the Atlas, which was a guided missile, an ICBM. But it also became a booster for satellites.

LaBerge: By this time, did your dad work for General Dynamics?

Maddow: Yes, but he was in the Convair division, right. And my mother also worked there as a secretary in their headquarters.

But everybody was thinking about space. It was the late fifties, and people were thinking about space, what led up to Sputnik and all this kind of stuff. This was before John Kennedy issued the challenges to us and all that. But I decided that, by golly, one of the things that I could do would be to become an engineer and work in the missiles and space type things, or in aeronautics, something like that. So I had decided probably in the beginning of my junior year that I was going to shoot for a school where I thought I could get a really good education and the opportunity to really do something in those areas, space programs, et cetera. So when I was going off to college, I wanted to be an engineer, beat the Russians to the moon and all these things. And Stanford had a wonderful program. Of course, so did Berkeley.

Stanford University, 1960-1964

Maddow: So I applied to both, and was accepted to Berkeley before I was accepted at Stanford. I was all primed and ready to go to Berkeley until the Stanford thing came along, and you can't turn Stanford down. That was the way I looked at it, anyway. Now, my parents blinked, of course, because--

LaBerge: The price?

Maddow: Yes. And they made just enough money--I mean, it was the same then as it is now, it's just that orders of magnitude difference. They made just enough money so I couldn't qualify for financial aid, and not enough money to be able to afford to send me to Stanford, so they really, they scraped for me to be able to go there. I still remember that my freshman year, the tuition was $335 a quarter. And by the time I graduated, it had more than tripled. So we were paying tuition of like $1,200 a quarter or something like that. My daughter went to Stanford thirty years later; I don't even want to think about what the numbers were then. [laughter] But it was an incredible sacrifice for my parents, and something for which I wasn't very grateful in those days, because I was a typical immortal teenager who only thinks about himself. And yet, looking back on it now, it's the sort of thing that parents do, and I didn't have an appreciation for it until much later. Maybe I didn't have a full appreciation for it until I became a parent and had kids going to college and all of that.

But when you talk about the people who really have an influence on you as a young person, obviously, your parents have this enormous influence. And in my case, it was a positive influence, but it wasn't like some parents where you're following in the footsteps of your father or your uncle or your mother or your aunt, who went off to some college or whatever. That wasn't a part of my parents' experience. My parents' experience was one of hard work, and commitment to trying to see things better for their kids, et cetera.

After my sister got married, I guess to some degree they focused a lot of that on me, and that's why they were willing to sacrifice as they did, so that I could do what I'd kind of set out to do. If I had to do it all over again, I would have been a much more grateful son at the time than I was. I kind of distanced myself from them. That was a mistake.

LaBerge: I think everybody looks back and sees that. It's a part of growing up.

Maddow: I think so. It's a part of breaking away which we all have to do, but there would have been a more graceful way to do it and a more thoughtful way to do it, and I know that now. I think my own kids, I think both of my kids in their own way did a better job of it than I did, but part of it I think is because they may have absorbed a little something from me and Elaine about that. So it's funny, it's a funny thing.

Anyway, now we've got me--

LaBerge: Right. But you didn't become an engineer. What happened?

Maddow: No. Well, you remember I said I wasn't as good in mathematics as I thought I was? The differential equation became my grade equalizer. I did not do very well in mathematics when I got to Stanford. I just--I really thought I was cut out to do the fast-track stuff there, and if anything, I should have enrolled in the slower track of math because the fast track kind of ate me up and got me down and all those things. So my freshman year was not a very good year, largely because I kept thinking to myself, I can do this, I can do this. And I couldn't. [laughs] I struggled with mathematics in my freshman year, and finally after being beat upon by an academic advisor, I realized that I needed to find something else to do.

So what I did instead was to, for my sophomore year, I was undeclared, and at the end of my sophomore year, I declared a major in political science. And the reason that I chose political science was that by that time, the end of my sophomore year, I had met enough course requirements to graduate in political science in four years and leave myself a lot of opportunity to take classes in the History Department and in the English Department, as well as political science stuff, and also to throw in a couple of electives. Interestingly enough, what I threw in were two geology classes and a theater class. Now, if you ask me to explain that, I don't know that I can.

But I declared political science at the end of my sophomore year. I'm glad that I did, because it gave me an opportunity to

do a lot of reading about government and--I've never been as interested in sort of the politics side of political science as much as I am the government side, the public policy side. And I began to get sort of a grounding in that at that time. I read a lot of John Stuart Mill and Edmund Burke.

LaBerge: Did you have any idea of going on to law school at that time, or were you just--?

Maddow: I was thinking about it. I began to think about it seriously at about the time I began to look at the possibility of declaring a major in political science or history or English. I was pretty sure I wanted to go on into a graduate program, and the law seemed a logical one, although I really didn't have any role model, really. There was one fellow who lived across the hall from me in a dormitory who to some degree was a little bit of a mentor. He was a history major. He was a year ahead of me, and he was a real hyperactive kind of guy, and much more studious and bookish than I was in those days. But he and I talked a lot about law school as a possibility. He ended up choosing to not go to law school and now, in fact, is a dean at Stanford.

LaBerge: What's his name?

Maddow: Larry Horton. Larry and I talked about law as a possibility.

For a short while in my junior year, my academic advisor was a man named Allard Lowenstein, who later became a congressman and was very much involved in the antiwar movement and the civil rights movement.

LaBerge: Was he a congressman from New York?

Maddow: Yes. He was later murdered by a guy who lived in our dormitory and whose name has just escaped me, a guy who was involved with the summer in Mississippi--what was his name? Oh, golly, I just can't think of his name. A fellow who was a year behind me or two years behind me, who just cracked at some point and ended up killing Al Lowenstein.

Anyway, Lowenstein--he had to be an academic advisor because everybody had those responsibilities, they had to go and advise these undergraduates. And I don't think he liked doing it. I think what he liked doing was organizing students to go off and do things, like the summer in Mississippi with the voter registration stuff and all of that, or later all the antiwar things that he did, that sort of thing. That's what he was really good at. But when he sat down to talk to you about your academics, he expected you to tell him, and he could either say yes or no.

Well, I had too many questions, and I can remember two or three different times going in and talking to him and feeling as though he was kind of harumphing me, you know. But actually, he and I did have conversations about law school and what it meant for somebody who had no clearcut path ahead of him. He recommended it to me at least in part because it can be a basis for doing a lot of different things. Up until I spoke to him, I think I viewed law as a narrower field than perhaps I might have. One of the things I can remember him talking to me about was people in fields other than the legal profession who were lawyers and for whom the legal education was a part of their foundation, and it wasn't necessarily--they weren't practicing lawyers. So my experience with him, even though it was short, and it was a lot different from a lot of other people who knew him at Stanford, my experience with him was valuable. Helped be a shaper, I guess I'd say.

LaBerge: Was he also one of your professors?

Maddow: Let me think. I think I took like a two-unit class or something like that from him, and I can't remember what it was now. I should remember those things better than I do. But I really only knew him through this advisory role. I had a ten-week class that was some kind of a--it wasn't a senior colloquium, it was a--something about American political thought in those days, but I can't remember what it was. I barely remember it, so it obviously wasn't anything that really inspired me.

I actually took more inspiration, I think, about things like public service and that sort of thing from some of the history professors I had. Gordon Craig was this wonderful professor of European history, and Thomas Bailey, and some of these people who just made history sing. With the modern history I read about World War II, for example, and I had done a fair amount of American history work, I think I got a bit of a grounding in how important history is.

One of the reasons why I was so interested in this oral history program is that I believe that institutions like East Bay MUD, for example, need to understand their history, because the role that they play--and this can be true of so many different types of institutions--the role that they play is so much a function of how they got to the position that they're in in their particular niche and their particular segment of the society. You need to understand that history to really be able to understand where the institution is going to go.

That's the part of public policy that I like: how do you take what you can learn from your past and use it to help you learn where you're going in the future? People like Jack Reilley and Harold Raines and Walter McLean and people from their era can really provide sort of a polestar, and I hope I can maybe contribute some of that too.

Hastings College of the Law, 1964-1967

LaBerge: Where else did you apply to law school?

Maddow: Boalt Hall. You know, I think I applied to Harvard. I don't know why, but I think I applied there.

LaBerge: Well, your aiming high at Stanford, you might as well--

Maddow: My grade point at Stanford was a little under 3.0 when I graduated, so I didn't have much chance of getting into Harvard. Hastings in those days--I don't know how Hastings' admissions are right now; I don't think they've changed all that much. But Hastings College of the Law would take many more students. They would take a chance on many more students than some of the other law schools. But half the people didn't survive the first year. And so by the time I was applying to law school, I had managed to muck up my college transcript enough by staying in mathematics too long and kind of not knowing where I was really headed so that I wasn't going to be able to qualify academically for places like Harvard Law School and Boalt Hall--oh, Stanford Law School, I applied to Stanford also. I think I actually made a waiting list there.

But Hastings was a place that I thought would be a good place for me, because I loved San Francisco by that time, and it was right downtown. It was a very challenging place, and I knew I needed that. I knew I needed that structure. The threat of half the people flunking out was enough to provide me the motivation I thought I needed. So I was really pleased to be able to go to Hastings.

Looking back on it now, if I had to do it all over again knowing what I know now, I would have gone to Hastings, but I would have gone at it a little differently. I wasn't quite sure where in the law I wanted to head, and one of the reasons why I had that uncertainty was that so did everybody in our class, which was almost all men; there were almost no women in our class. I remember it was something like four or six or something like that out of several hundred graduated. Now I think it's 52 percent women or something like that. But this was the era of Vietnam, and I was in the last year, next to last year of the student deferment that would keep you from being drafted out of school, and we just had that hanging over our heads. So it was hard to focus on what I wanted to do with the law when I was so sure that as soon as I finished with law school, either because I flunked our or dropped out or graduated, I was going to have to do something that was going to involve the military. I just knew

it. It was either going to have to be military or an alternative to the military.

I applied to the FBI, I applied to the coast guard, every reserve program that came along. Two of my roommates and I stayed up all night at Hamilton Field trying to get into the small number of people who got accepted into a national guard or an air force reserve unit or something that was up there. I think there were a couple hundred men who stayed up all night out there, trying to get their name on this list. So I wasn't really thinking about, What am I going to do after law school? I was thinking--other than with the military. I wasn't thinking about what kind of law I was going to practice or anything like that, because Vietnam was just this incredible brooding presence for all of us.

So when I finished law school, I knew I was headed for the military. I actually had been accepted to officer training school while I was studying for the bar--actually, before I graduated, I guess, and then studied for the bar. Took the bar in August, and went off to the air force at the end of September. Found out while I was in officer training school that I passed the bar. So everything kind of ran together there.

Jobs During Student Years

LaBerge: I forgot to ask you, and I didn't ask you on the first outline: did you have summer jobs, or did you work on campus?

Maddow: I did a number of different things. In high school, I really didn't have much other than sort of odd jobs. I mentioned Ed Seipel. Ed had a friend who had a construction company, and he used to hire Ed's son Jimmy and our other friend Phil and me to do odd jobs. For example--

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LaBerge: Okay, he was a plumbing and heating contractor.

Maddow: And one year, he foreclosed on a mechanic's lien and ended up owning an ice skating rink that was in fairly decrepit shape. He hired me and Jimmy Seipel and Phil Crabtree to go in and redo not the plumbing and heating part of it, because he'd already done that, but for example, the rail around the ice skating rink that gets all torn up from ice skates and all that, and the rubber tile in the areas where people change. We redid the whole inside of the place, and then one day he came in with a paint sprayer and said, "Any of you know how to use a paint sprayer?" I said, "Yes, I think I do." And he tested me out and figured out that we knew how to paint well enough, so he let us paint the inside of this ugly old ice skating rink. We did things like that.

Then when I was in college, I alternatively went to summer school or worked at sort of odd different kinds of jobs. One summer I worked for the Los Angeles Flood Control District, I guess it was, L.A. County Flood Control District, working on just physical work, construction-type work, and clearing rights of way and things like that, pouring a little concrete, digging lots of things, hoeing weeds--you name it, if it was physical labor, we did it.

One summer I went to summer school and also worked in a theatre which was a theatre in the round, a place called Circle Arts in San Diego. It was the same sort of thing as Circle Star up here. They did these Broadway musicals in the round, and I worked as an usher, and occasionally they'd have us help with carrying props, although not much of that, or building things or whatever, and I loved that. It was really fun; I thoroughly enjoyed that theater job.

One summer, I think when I was in law school, just before the finals in my second year, I came down with mononucleosis, and I was really wiped out. I was able to take all but one of my finals, but that summer, I was not in very good shape for the beginning of the summer. But towards the end of the summer, actually like the last couple of months, I went to some temporary

agency or something. The first job they sent me out on was to load hundred-pound sacks of rice in a truck, and here I was a skinny little kid who'd just had mono; that didn't work too well. Fortunately, there was another guy, and the two of us did that.

But then the next day, they sent me out to this--actually, in these days it was called General Atomics. It was another part of the General Dynamics family. And they had what they called a high explosives testing facility, HET. General Atomics, among other things, I think, built something that had to do with nuclear weapons--I mean, because General Dynamics, Convair Astronautics and whatever all the companies were called, they built intercontinental ballistic missiles. And this one part of the company, I think, did something with regard to the fuses or something, and they blew things up. They had these weird cameras where they could take an enormous number of frames of film in the fraction of a second between the time when the fuse would ignite the explosive. I never knew what it all was, but it was some kind of fancy testing stuff.

Well, they needed people to do sort of odd jobs. They were out in the middle of this almost like a desert east of San Diego. When they would blow stuff up, hot pieces of metal would fly around and start little fires. I was the guy who built the racks for the backpacks that held, I don't know, twenty gallons of water or something with a little nozzle on them that the crews would run around and put out the fires with. I built racks so that they could put one of those on either side of all the pickup trucks. I had never done anything like that before, but they just said, "Can you run a band saw and do this?" I said, "Sure." It was just crazy stuff.

One day we went out, and we were the first people to arrive at the scene of a navy jet that had crashed. This was very close to the landing pattern for the Miramar Naval Air Station, which is where the navy had what later became known as the Top Gun school. I remember hearing this horrible noise one day, and it was an airplane crash. I didn't actually get all that close to

it, but some of the other people did. So that was another kind of an oddball job.

When I was in law school, I worked in a couple of odd jobs. I worked in a printing place, where I did everything from sweeping the floors to taking this weird paint and painting out the clear spots in negatives of these engineering prints that they were doing through some photographic process. Picked up a couple of little research jobs here and there in law firms, but nothing that really was going to lead me anyplace, because I wasn't like a lot of the people who were out there really busting their backside trying to land a job in a law firm, because I knew I was going in the military. There wasn't any two ways about it. My student deferment had kept me out of the military for quite a while, and I knew it wasn't going to last forever.

So I ended up in the air force.

Social Life in College

LaBerge: What about student life in college? What else did you do besides take your poli sci classes and--?

Maddow: Well, I was pretty much a nerd, I think. [laughter] I lived in dorms. I had the opportunity to pledge a couple of fraternities, but I wasn't all that interested. If one of the fraternities with all the basketball players or something had asked me to pledge there, I might have been interested, but they weren't interested in me, I'm sure, so I knew that was the case. But there were things about fraternity life that didn't appeal to me. It was a little too raucous and I knew it was going to be too expensive. I lived in dormitories just about the whole time. Roomed with one fellow who later became an engineer for an automotive company. We roomed together for most of three years. Right across the hall from us for those three years were two guys, one of whom was the one and only basketball player who

wasn't in a fraternity. Actually, I had known him all through high school, because his father was one of the inspirational people whom I should have mentioned before. He was a vice principal of my high school, and this fellow and his brother both went to Stanford and both went on to do good things.

But his name, I should tell you, was Mr. Raaka [spells]. He was a vice principal and was a guy who was really somebody that the people who were the leaders of the student body looked up to. He's the person who told me, "Apply to a place that's your ideal, and one in the middle, and one that--" it wasn't Mr. Stout; it was Mr. Raaka.

Mr. Raaka's son Clayton was in my class, lived right across the hall from me in this dormitory for three years, was a starter on the basketball team for two or maybe all three of those years, was a complete flake, and was a wonderful guy. I've completely lost touch with him, but he was Larry Horton's roommate. Clayton was about six-foot-five and Larry was about five-foot-six, and I'm about six-two, and my roommate, Stu Westcott, was about five-foot-six. Wherever we went, people always used to talk about "the long and the short of it." [laughter]

I became involved in some campus activities. In some of the things around sort of dormitory life and that sort of thing, I got involved in doing things, but I wasn't president of this or that in those days, I was more a worker bee. I served on a couple of campus-wide committees and things like that, but not anything that was any great shakes. I remember in my last two years, I was on something called the Campus Overnight Committee, and looking back on it now, I wonder how we even existed. In those days, for all the living groups, the big social events of the year would involve overnights. God, there must have been--I mean, overnight--I look back on it now, and it was probably in those days, when we had the men's dormitories on one side of the street and the women's on the other, that was probably as close as you came to sort of sanctioned sexual escapades or some such thing, I don't know. But we actually were students who were given the responsibility of checking to make sure that the places

people were going for overnights were okay, that there were rooms for the women over here and for the men over here, and God only knows whatever would happen there. I look back on that now and I say, "What were we doing?" But this was in the early sixties, before all the revolutions of the later sixties, and so I guess maybe it made sense in that context.

LaBerge: Well, I was in school in the later sixties, and I can relate to all of this. [laughter]

Maddow: That's funny. But I became--after I kind of went through the bad experience of thinking I was going to be an engineer, I was never a real bookworm, but I was kind of sopping up all there was to sop up at Stanford. I went to a lot of everything. I went to a lot of sports events, I went to a lot of cultural events, I went to a lot of the movies that were shown on campus on Sunday night, I liked to go to those. I liked to go to the various theatrical and music things--not all the musical things. In those days, I didn't like the opera. Now I love the opera. I went to the opera when I was there a couple of times, but you know, it just wasn't exactly my cup of tea.

I guess it was when I was at Stanford that I became a devourer of newspapers, which I still am. Stuart was from New Jersey, my roommate Stuart, and he subscribed to the New York Times Western Edition when it was first published. The two fellows in the room next to us that year were Joe Jacobs and Pete King, who were both involved with the campus newspaper. We kind of just fed off one another's thirst for what was going on through the press. As a matter of fact, there were times when I thought if I didn't go to law school, I might try and take my chances in journalism, because I was so interested by it.

Pete King was the sports editor of the Stanford Daily, and through Pete, I used to sometimes get to go with him when he would interview the star of the other football team that Stanford was playing, or those kinds of things. I enjoyed those kinds of things. We'd be up in the press box and Pete would be doing his

reporter's thing, and I'd be his spotter, things like that. So I did a lot of things, a lot of things like that.

I didn't own a car, and so I found myself not able to get out and see as much as I would have liked, but I used to find myself always looking for ways in which to go places and see things around the Bay Area. That's when I formed the attachment that stays with me today. It would be really hard for me to live anyplace else, except maybe Lake Tahoe or something. Does that help?

Vietnam's Impact: Nationally, Locally, and Personally

LaBerge: Oh, yes, it's great. Do you want to say more about either Vietnam or just that kind of atmosphere that was over everybody, your friends and the campus--

Maddow: Well, it was.

LaBerge: It's something that younger people today wouldn't understand if they haven't lived through it.

Maddow: I won't say a whole lot about it, but I will say a couple of things.

Perhaps the event that more than any other single event about Vietnam sticks in my memory has to do with someone I just mentioned, Joe Jacobs. Joe was a year behind me at Stanford. He had a twin brother, a fraternal twin. His brother's name was Carl. Carl went to Berkeley and Joe went to Stanford. And Joe really wanted to be a theatrical producer. His whole life was pointed in that direction. Joe got drafted, and when he got over there, his commanding officer saw that in every waking moment, Joe was writing letters. And he read some stuff that Joe had written, and he wangled an assignment for Joe as a combat

correspondent for Stars and Stripes. They would actually go into combat, sort of right behind the front-line troops.

And one day, Joe got caught up in a firefight and lost his glasses, and was slightly wounded, I think. I've forgotten the details of that. But anyway, they sent him back in a Jeep that was taking some people back to a rear area, and as I recall, the Jeep hit a mine and then came under fire, and Joe was killed.

And the reason I know about it is that Time magazine did one of its little vignettes for that week about the war about Joe, and about these letters that he wrote, and a particular letter that he wrote to Carl. And that hit me really hard. I remember reading it--I think that was in late '66 or early '67. It just tore at me, because Joe was somebody I had known well. First time I went back to Washington after the [Vietnam] Wall [was built], that was the first name I went to find. That's just really stuck with me. And I knew several other guys who were killed over there also, but none of them affected me quite the way Joe did.

The other thing was that when I was in law school my last two years, I lived in the Haight-Ashbury District. We lived up near Buena Vista Park in San Francisco in this old house on Buena Vista Terrace, and we jokingly called it the BVTAC, the Buena Vista Terrace Athletic Club. It was a wonderful old house that had been built in like 1903, and it was owned by a woman named Mrs. Sipes, who was I think a quarter American Indian. She and her husband had owned this house, and he passed away, and she owned it all by herself now, and she had these generations of law students upstairs. What a fool! [laughter]

But some interesting people. John Herrington, who is now the chairman of the state Republican party, was there. He was at that time engaged to Lois Haight, who is now a judge out in Contra Costa County. Guy Rounsaville who's the general counsel of Wells Fargo Bank, and Bruce Patterson, who's an assistant district attorney of Orange County, and Chick Hastings, who's now the county attorney, been the county attorney of Yavapai County

in Arizona for twenty years. So we had a bunch of good people that went through there.

And in '66 and '67, we were close enough to the Haight-Ashbury as it was really getting roaring, so that we were able to observe everything that was going on down there. And of course, a lot of what was going on had a strong antiwar flavor. I'd have to say that we were probably in the group that was a little bit more conservative than--certainly the law students were more conservative than what was going on in the streets for darn sure, but among the law students, I guess I would have to say my personal politics, if I had any, were a little on the conservative side, looking back now. Because I really didn't understand the antiwar stuff all that well. If John Kennedy and Lyndon Johnson and people like that were getting us committed to these things, by golly, there--and I was a lifelong Democrat and all, and my parents were, and all this. I didn't really get my eyes opened for a little while.

I can remember the day of the first really huge march in San Francisco. What's the street just up from McAllister, is it Golden Gate? The street right behind Hastings I think is Golden Gate Avenue.

LaBerge: I think it is Golden Gate.

Maddow: And Channel 7 had its offices right there. When the students marched--students; the marchers marched; they weren't just students--I think it was the first time there were like 100,000 people in the streets. They went right by Channel 7. I remember sitting on a car right in front of the Channel 7 watching these people go by for a couple of hours, and I remember thinking to myself, Wow. What is this? I remember thinking, because we used to kind of joke about--these were the early days of hippies and all that, and we used to see some of the first of the wild scenes, used to kind of joke about it. After a while, you began to realize there was more to it than just a few freaks and weirdoes, which is probably what we were thinking at the beginning, because as I say, my friends and I were more

interested in sports and staying in school than we were in politics, I guess I'd say. But it began to sink in after a while, and we began to realize there was something going on that was kind of tearing at the heart of the young people in particular, but eventually we began to realize it was a lot more than that.

When John Kennedy [1963] was killed, it was the fall of my senior year. I remember being one of the young people who was just totally devastated by that. And I remember sort of the first real political awakenings for me were watching what happened as Lyndon Johnson became president. I knew enough about political science and government at that time to understand that Johnson had an incredible opportunity to do something. It was largely because he was in the period right after President Kennedy was killed and the nation was looking for someone to serve as a leader, but the thing that I learned through studying some political science from a Professor Watkins in particular and a man named John Bunzel was that somebody like Lyndon Johnson was probably ideally situated right then, because he knew how to get legislation through the Senate.

So here I was, just out of poli sci education at Stanford, and I was able to watch the Civil Rights Act and all the things that happened in '64, '65, through legislation. And then I watched as Lyndon Johnson's presidency fell apart, because of the war, and because the consummate politician had feet of clay.

All that was going on at the same time that I guess I was watching the kids in the street, and it began to kind of--it all began to kind of reshape me in terms of my own thoughts about politics and life in general. I guess I never became a radical. I guess I never became even a real--I've always thought of myself as being sort of on the liberal side of politics, but I also understand that when you're twenty--someone said, it may have been one of the English or French political philosophers who said, "If at twenty you're not a liberal, you have no heart; if at forty you're not a conservative, you have no head." Well, I'm a part of that, and I understand all that. But I think since

that awakening in the mid-sixties, it was so driven by Vietnam, I think I intended to be a person who tends far more towards the liberal side of political thinking, and questioning, and turning away from some of the things that were happening and have happened on the political right.

But through it all, I always find myself going back to the policy issues as opposed to the political issues. What's the policy that we're following? What's the policy that's at the heart of what we're doing? What's our mission, what are our objectives? And for Vietnam, for me, I never figured out what our objectives were after I began to think about it.

U.S. Air Force, 1967-1972

Maddow: That became particularly true when I got in the air force and I was supposed to learn about these things, and it was really hard. But I ended up with work assignments in the air force that were about as far removed from Vietnam as you could be and still be in the military, because I worked in the space and missiles program. And that didn't have anything to do with Vietnam.

LaBerge: Had you requested that, or--?

Maddow: No. Oh, absolutely not. It was a really strange thing. I was in officer training school in November and then early December, and there were eighteen of us in our flight. Sixteen of the eighteen already had their assignments, and I still didn't have one. My roommate and another guy and I kind of hung around together. We were always joking about how the last one was going to get the worst one, you know. Then one day, I get this call saying, "Your assignment's in," and I went down and looked at the orders, and it talked about something I'd never heard of. I was assigned to the headquarters of the Space and Missile Systems Organization, known as SAMSO, just south of the L.A. airport. It was at Los Angeles Air Force Station on El Segundo Boulevard.

The reason I got that assignment was that there was a colonel named Don Nunn, who was like the number two executive in this organization, and I'll talk some more about that in a minute. And he wanted, as he put it, a couple of bright young lieutenants for some real special assignments, and he picked me because of my education. Now, I had been selected to go to something called Procurement Management Staff Officers School. They did that with a lot of people who had law degrees. There were about 300 or 400 people who went into the air force in '67 and early '68 who had law degrees, but they didn't have legal billets for them. All the JAG slots, judge advocate general, all the JAG corps slots were full.

And so they were looking for other things for us to do, and so they started to push a lot of us towards contract work, and that's procurement management work. You go to this school up in Colorado where they teach you how to write an air force contract, and administer an air force contract, and all this stuff, how to buy widgets.

Well, the lawyers generally got the assignments to the material acquisition commands. Like my old roommate, Chick Hastings, he went up to Electronics Systems Division up in Boston, and I got sent to SAMSO, and my friend Russ Allen got sent to SAMSO. We all went to the places where the contracts were more complicated and the issues were a little bit more esoteric, and they could use our law degree.

Well, when I showed up there, I got assigned to work in the office that wrote and administered the annual contract with an air force-sponsored think tank called the Aerospace Corporation. Now, the model for Aerospace was the Rand Corporation, which was the first of this sort of government-sponsored defense-oriented think tank, only Aerospace had a much more clearly defined mission. Rand was for strategic thinking and that kind of thing, and policy analysis. Aerospace was, to use the jargon of those days, the general systems engineer and technical director of the entire air force missiles and space program, with the exception of the part that dealt with warheads. That work was done by TRW

Corporation. They were like the architects of missiles and space program. Aerospace had a unique contract that got special congressional attention every year, and my job was to work on some aspects of preparation for the congressional presentations, some aspects of the contract writing, with a particular emphasis on certain legal issues and on certain of sort of the congressional issues where there was always going to be a lot of congressional oversight, and then certain aspects of the contract administration.

For most of the time that I was in that office, I was the only military guy. All the other people were federal civil servants. They reported to a man who was a very high-level civil servant named Mr. Reiser, Morris Reiser. And here I was, a second lieutenant, and I reported directly to Mr. Reiser's boss, Colonel Nunn. And boy, was that ever a strange situation.

Colonel Nunn's Influence

LaBerge: Did you know Colonel Nunn before this?

Maddow: I had never met him.

LaBerge: Okay, he had just picked you out from your resume?

Maddow: Colonel Nunn had been a real what they call fast burner in World War II. He was not a combat guy. He was a military logistics guy and did a lot of work in the Pentagon and at the very highest echelons of first the army air corps and later the air force, sort of the inner workings. And then he got out, and he was a very successful businessman in Connecticut, I think. He got ordered back to active duty in Korea. The stress of his business career had screwed up his family life enough so that he knew he didn't like that so much, and so he salvaged his family by going back in the air force, and stayed in, and ended up retiring as a two-star general, I think.

When I knew him, he was the third ranking person in SAMSO. The first ranking person was Jack O'Neill, who was somehow related to [former Speaker of the House Thomas] Tip O'Neill, but who looked like the classic air force general. He was a handsome man. He had been a fighter pilot, he had done all of the--he was dashing, is what--

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Maddow: --because O'Neill wanted to work on the high-end technical stuff and the interactions with the Pentagon and all that. And O'Neill used as the guy he really relied upon, he used Colonel Nunn. So Colonel Nunn was kind of the number-two businessman in that organization, and he really took a shine to me. He relied a lot on my being willing to work very hard at things that I didn't always understand. He knew that if he gave me a mission, I would accomplish it. If I screwed it up, I could go to him and tell him I had screwed it up, and he wouldn't beat me, he would understand. He was just a really good boss.

He got me into stuff and took me places and had me meet people that I wouldn't have ever had exposure to otherwise. When we were working on stuff with the Congress and all of that, it got to be really fascinating stuff. I didn't get really--I mean, I wasn't the hands-on person with Senator This or Congressman That, the colonel was; but I was the guy writing his stuff, and I was the guy preparing his charts, and I was right behind him all the time. It was great experience.

LaBerge: So you would go to Washington with him?

Maddow: Occasionally. More often than not, I would be preparing the things that he would take to Washington with him, but each of the two years I worked for him, I made at least one trip back to the Pentagon, and it was always in the worst time of the year when it was just stinko. We would either be in the Pentagon or over at Andrews Air Force Base. It was great experience, and I must confess that Colonel Nunn is one of those people who helped me begin to understand how the understanding of mission and the

public policy issues and the actual running of the business kind of fit together. He was very good at that, and I liked him a lot. I really liked him.

JAG

Maddow: But the whole time I was working for him, I also knew that I would very much like to get into JAG [Judge Advocate General's Corps], because I wanted to really begin to use my legal training. There were actually several hundred of us who were working at that, and eventually, I've forgotten the number now--I think it may have been a couple hundred--were actually allowed to transfer from their original billet, again most of them procurement management--I say "most," one of the guys was actually running a prison [laughter]--but in any event, most of them went from a procurement management-type billet over to JAG, and most got relocated, but I didn't. I think I may have been the only one who ended up staying right at the same location. I just went from the Aerospace building over to the headquarters of the SAMSO, and I moved into the Judge Advocate General's Office there.

LaBerge: So you never went to Asia or to Europe, you were stateside the whole time?

Maddow: I tell people that I spent my Vietnam service years living on the top of a sand dune in Hermosa Beach, and commuting to work four or five miles in my Volkswagen Bug, half of the time being the only military person in the office where I worked and therefore being able to get away with having sideburns that were too long and all of that. And then the last two years, two and a half years, about, I was in the JAG, and I was in a military law office that was really laid-back. We worked hard, but it was not like most military careers by any means. There, my first boss was Carroll Kelley--[spells] that's a man. He was from Boston, and had the thickest Boston accent you could imagine, and he

really got along with General O'Neill who was also from Boston. But Colonel Kelley had known me when I was over at the Aerospace building, because I had done a lot of work with him, and he and I got along very well, and I liked him a great deal.

One of the things that he let me do when I was working for him in the JAG was he allowed me to be the lawyer who spent the most time with our cadre of reserve air force lawyers. They were an incredible group. One was Evelle Younger, who at the time was district attorney of Los Angeles County and later became the attorney general of California. Another one was a man named Buck Compton. Compton was the man who prosecuted Sirhan Sirhan.

LaBerge: Okay, I knew that name was familiar.

Maddow: And later was appointed to the court of appeal, and after Colonel Kelley retired, Buck Compton hired him to be one of his research attorneys, because they'd gotten to know each other through the military assignments, and Compton really formed a healthy respect for Kelley, who was a full colonel, old-style air force, shock of white hair, actually had his wings and all that stuff, but he was a lawyer's lawyer. Just a wonderful lawyer.

So we had a good office in that respect, but then when Colonel Kelley retired, we got in a guy named Colonel Chet Taylor, who had just come back from the Philippines, and he was more a military man's lawyer than a lawyer's lawyer. He set his cap for convincing me to become a career military lawyer, and told me he was going to make sure that the assignments I would get would be good ones. The first assignment that came through for me looked like it was going to be in Guam, and it was going to be unaccompanied for fifteen months, I think, or eighteen months, I've forgotten which it was. Well, I had a young son, and I didn't want to do that. So then he said, "Oh, don't worry about it, I can get that changed and we'll get you sent to Clark Air Base in the Philippines." Well, I didn't want to go to Clark either.

It was funny, because Colonel Taylor and his wife, whose name was Rita, invited me and actually, several of the other young captains over one time to have dinner and to look at their pictures of Clark. It was because one of the other captains had just been assigned there, and Colonel Taylor wanted me to go there. The other guy, he'd already made up his mind. He actually did end up staying and making the air force a career, but that's what convinced me more than ever that I was getting out. [laughs] I was not intrigued with the thought of going to the Philippines. The things that he and his wife found really exciting about Clark and the Philippines were things that didn't appeal to me.

And so I decided that I would get out as soon as I could, which turned out to be May of 1972--actually, April, I guess. But altogether, my active duty time was a little more than four and a half years, I guess, something like that.

LaBerge: Which was more than you had to?

Maddow: I had to extend a little bit when I talked my way into the Judge Advocate General's Corps, because I had been in the procurement job for a little more than two years at that point, and they made me sign on for two years of JAG service. My military career was odd, but I have to confess that I learned a lot about myself. It's when I started my family; I got married when I was in the service, to someone whom I'd dated when I was in law school. We had our first child then, and began to really start the main part of my life then. Looking back on it, we had a wonderful life. We lived in this rented duplex--

Family: Elaine, David, and Rachel

LaBerge: Now, before you tell me that, we have a little bit of time: tell me how you met your wife.

Maddow: She crashed a party that I was invited to. (She hates that characterization, but I maintain that it's true!)

LaBerge: Her name is--?

Maddow: Her name is Elaine.

LaBerge: What was her maiden name?

Maddow: Gosse [spells]. She's from Newfoundland, and had come to California in 1963. We met in '65 at a party. We had mutual friends and that sort of thing, and we began to see each other. And then, oh, we saw each other a little bit early on, and then I went away for the summer. That was the summer when I was--let's see, I went to summer school--that was the summer I worked in the theatre. And then came back the next year, and got back together again in the beginning of my second year of law school and really kind of became serious then. In fact, it was the end of that year when I got mononucleosis, and she and her sister were the ones who nursed me back to health. They let me stay in their apartment. They both worked in the financial business. Elaine was in those days what was called a portfolio analyst for Dean Witter. That was one step below being what they called a securities analyst. Nowadays, they don't have portfolio analysts any more because computers do all of the work that she did. And her sister was the secretary to the president of the Pacific Coast Stock Exchange.

Anyway, we became serious in my second year of law school, and knew in my third year of law school that we were going to get married after I joined the service, and did. She is absolutely the best thing that's ever happened to me, and is the best friend a person could ever have, as well as being a wonderful wife and a wonderful mother of our two great kids. So our life together has been really full and really rich, and I wouldn't change very much about it at all.

Her father was a fisherman who married later on in his life. When I say fisherman, in Newfoundland that means fishing what's

called the inshore fishery, which is fishing for codfish out of very small boats. But he bought land as he could with the money he raised there, raised eight kids, six of whom are still back there, and then Elaine and one sister out here. She came from--it's a really solid stock that she comes from, really very solid English and Irish stock, and people who just are sort of the salt of the earth. Her mother, who's eighty-seven, is still alive, a very compelling woman. Seventy-seven years old before she ever left the island of Newfoundland, and she left there to come out to see us.

LaBerge: Oh, my gosh.

Maddow: So it's a remarkable family.

LaBerge: And your children, you have a son?

Maddow: I have a son, David, who's twenty-seven. David is a Bishop O'Dowd High School graduate. Went to UC San Diego, graduated in biology. Didn't know what he wanted to do, still doesn't know what he wants to do. Works in a law firm as the assistant office manager, where he does everything from soup to nuts, including everything from paralegal work to bookkeeping to grunt work and office management. He lives in San Francisco. He's a wonderful kid, and just great fun. He's still in search of the perfect party, I tell him. [laughter] He can do anything he puts his mind to, because he is really bright, has no fear of anything, and approaches each day with good humor and great wit. Elaine and I are really proud of him.

And then we have a daughter, Rachel, who is twenty-three.

LaBerge: And is at Oxford right now, but she must have done something before--she went to Stanford?

Maddow: She did. She didn't go to Bishop O'Dowd; she went to Castro Valley High, and then went to Stanford, and just lit it up. I mean, her college career is the exact antithesis of mine. In the first place, Rachel when she was young was very athletic, and

actually was offered the ability to go play volleyball a couple of places and that sort of thing. And actually, when she was applying to Stanford, they had to write this essay, and one of the things she put in her essay was that "I have a tape of some of the highlights of my volleyball career to show to Coach Shaw if he's interested in allowing me to try and walk on." Well, in the spring of her senior year in high school, she tore up her shoulder, and she can't do anything any more. But all the energy she'd put into athletics have gone into her academics and her other types of things.

Rachel, when she was in her senior year in high school, began to work as a volunteer at the AIDS Center in Oakland, which in those days was headed by a nun in her sixties whose name I've forgotten. But Rachel got very interested in AIDS, and ran the AIDS education program at Stanford, and became very involved in sort of health care issues through that. And worked a couple of summers, one at the Leonard Davis Health Economics Institute, which is part of the University of Pennsylvania, and one summer she worked in Washington for a national coalition on AIDS policy, I've forgotten [the name]. But it was a wonderful opportunity to learn about the economics of health care delivery on the one hand, the politics of it on another hand, and then all the things that she'd learned through all of her other work.

Then she graduated early; she won all kinds of awards, graduated with distinction, all these kinds of things. Won an Elie Wiesel prize for an essay that she wrote, and won a medal for her thesis, which was on a subject related to AIDS and the delivery of health care to AIDS people. And then won a Gardner fellowship; there are six of those granted every year, three for people from Berkeley, three from Stanford. They're called Gardner fellowships, named after John Gardner, who was LBJ's secretary of HEW [Health, Education and Welfare] and then has worked for all the presidents since then. But the Haas family endowed a fellowship called the Gardner, and what it did was enable her to work for a year in a public policy position, and they provided her a stipend. She worked for the AIDS Legal Referral Panel in San Francisco, which has 700 or 800 lawyers who

on a volunteer basis do work on legal problems of people with AIDS and their families. They have a public policy function headed by a really interesting woman named Eileen Hansen, and Rachel became Eileen's sort of number two and got all involved in the state legislation and regulation issues having to do with AIDS.

And then the real big thrill was that she was chosen to be a Rhodes Scholar, and that's why she's in Oxford now. Actually, she won a Marshall and turned it down for the Rhodes.

LaBerge: My gosh!

Maddow: There haven't been too many of those in the last few years, but she was one of them. She became interested in the Marshall because when she was a junior at Stanford, she actually spent her fall term at the London School of Economics, and she was kind of thinking she'd like to go back there, and you can't do that with Rhodes, but you could have with the Marshall. But then a number of people, including people whom she really admired, said, "Rachel, you can't turn down a Rhodes." For no other reason, you can't because if you turn down the Rhodes, nobody gets it. If you turn down the Marshall, somebody else will get it, and that was important to her, because one of her roommates was trying to get a Marshall at the time.

Anyway, so she's in her second year at Oxford. We should know within a couple of weeks whether she'll have another year there, because she's trying to compete her way into what they call the D.Phil. program to end up with essentially a Ph.D. in politics.[1] She's just finished her "viva." The viva is sort of the first round of the oral defense of your thesis. Just had that a couple of weeks ago, and has been meeting with her advisors and supervisors and turned in another mass of papers here just Friday. I just talked to her for a long time about it yesterday. She's having a real exciting time.

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[1]She made it--she is now in the doctoral program. [Her D. Phil was conferred on August 15, 2001].

Rachel is a political activist. Her politics are way out on the left. Rachel thinks that there are people in society and groups in society that are victims, and she wants to do something about it, and victims in particular through the work she started in high school: people with AIDS have been a real focus of hers. One of the things she did when she was on the Gardner fellowship was to write a piece of legislation called compassionate release, which had to do with women with AIDS in prison who are dying and who would like to be released so they could die at home with their family. It started off being a women's issue; it ended up being prisoners. And the legislation, she wrote it, she lobbied it, she did the testifying; it was passed by unanimous votes in both houses of the legislature and vetoed by the governor.

But that got her really interested, and so she's doing her thesis on health care issues, not just AIDS, but health care generally in the prison systems in the United States and Great Britain, and she has become very interested in prisoners' rights issues, particularly with an emphasis on health care. It's a very esoteric field, and every time she starts digging in, she finds that there are people who say, "We've been waiting for you, we've been waiting for someone to come along and do the research that you're finally doing. This is an area that needs attention," and to Rachel, that's a real attraction, because she sees people who she considers to be victims who need someone to become their champion. She'll never run for elective office or anything like that, but she will do something with her drive and her ability to focus, and she's incredibly articulate and a really fun kid at the same time.

So we're blessed. We have two wonderful kids.

LaBerge: It sounds like it.

Maddow: We have one who's still trying to find himself, and I think at about age thirty he will, and he'll do something important, I just don't know what it is. And Rachel, who's got this incredible ability to focus, and it's always been that way. So we've been--it's been a fast ride for their mother and me. I

don't mean to dote on Rachel in that respect, because both of the kids have been--we've been just extremely proud of each of them.

LaBerge: Well, this is a good place to stop.

Maddow: I don't mind talking about my kids!

LaBerge: You can talk more the next time. We'll pick up there and at the end of the air force, and what happened next.

Maddow: Great.

Religious Background

[Interview 2: February 17, 1997] ##

LaBerge: Before we start with how you got up north and working for East Bay MUD, why don't you tell me about your religious background?

Maddow: I did not have a real strong religious upbringing. My parents attended a number of Protestant churches while we were in Arizona, although not regularly, and the same was true when we moved to San Diego. There was nothing really--nothing like a strong organized religious influence. My recollection is we attended more Presbyterian churches than anything else, and that may have come from my mother's Dutch background. I do recall attending a vacation Bible school-type thing in a Lutheran church, actually, in Pacific Beach when I was in junior high school.

By the time I was in high school, my mother and father had become very interested in Christian Science, and in fact later became very active in Christian Science for many years, and then in more recent years have kind of fallen away from that. However, when I went to college at Stanford, I reasonably regularly attended the nondenominational chapel there, I think as

much as anything else because I really liked the music. It was a sort of calm in the middle of the storm of college, and I guess I needed that once in a while. I guess I realized that.

Then after I married Elaine, Elaine had been a lifelong Catholic. She's from a large family. Two of her sisters actually became nuns. One has spent her life in a religious order. One stayed twelve years and then got out and is now a social worker. But we had talked about this a lot while we were dating, and we had agreed that once we were married, that we would raise our children as Roman Catholics because that's what she knew.

After attending mass with Elaine for a very long time--let's see, I guess it's about ten years ago I went through a program called RCIA, which is Rite of Christian Initiation for Adults. That was the first year that particular program had ever been conducted at the church in our community, and I was in sort of the first class and still am an active member of the parish there. It's a church called Our Lady of Grace in Castro Valley. A large, old church, filled with sort of the original Castro Valley Italian and Portuguese families, and it's kind of an old-fashioned church.

For about the last fifteen years we've had Augustinians who have been the parish priests. We have not had diocesan priests, and we've had all these slightly offbeat Augustinians, and I've liked them a lot, and that's one reason we've stayed in that church. I can't profess to have had a really strong religious upbringing. But now I am a fairly active member of the parish at our church.

I'm not active in the sense of being one of the people the church always turns to when they need something done, but I am a regular mass attender, I do become involved in some of the activities. I make a point of being a participant in certain aspects of the congregational life and that sort of thing, and it's become important to me. It's sort of a source of--oh, I

guess I would say strength in a way, but calm, in a way, also. So that's always been important to me.

Decision to Leave L.A. and the Air Force

LaBerge: Okay. Let's go back to the air force. Your stint was up, and how did you get back up north? Or had you decided already you were going to come to northern California?

Maddow: I had always thought that I would prefer to go to northern California rather than southern California. My parents were still in San Diego. I had become familiar enough with the Los Angeles area during the air force years. We were fairly lucky, because we lived in Hermosa Beach, and I worked at the Los Angeles Air Force Station, which was about five miles away, and so I didn't have to get into the rat race of downtown Los Angeles too often. But occasionally I did, and I didn't like it.

My sister at that time was married and lived way out on the east side of L.A., and we would occasionally go out there. And each time we did, I would say to myself, I never want to get into this.

Then while I was in the air force, we had a fellow who had worked in our office while he was in law school, as a law clerk, who had gotten out and passed the bar, and he'd gone to work in the legal department at Texaco. Their office, that particular office, was out on Wilshire Boulevard on the west side of the city. I guess it was still in L.A. And he had talked to me a couple of times about whether I might be interested in going to work there, and I'd actually gone in and taken a look at the office and all that, and I knew that he lived in Manhattan Beach not very far from where we lived in Hermosa. So I tried out that commute a couple of times, and I said, "This is not for me." Because if I had lived in Los Angeles, in the Los Angeles area, I would have wanted to stay out at the beach.

So that had kind of given me a little sense of not wanting to stay in L.A. And I had always really enjoyed the Bay Area. I'd been here seven years for college and law school. So I began to think more about trying to locate job opportunities in northern California.

I also need to tell you that up through the early part of 1972, when I was still on active duty, the Staff Judge Advocate, my boss there in the air force legal office, was trying hard to convince me that I ought to make a career of the air force. Actually, he was able to give me a pretty good indication of where I would go, because it was clear I wouldn't be staying at Los Angeles Air Force Station any longer.

LaBerge: Is this Colonel Nunn?

Maddow: No, by this time I was working in the legal office, I was away from Colonel Nunn by now. He was running the business and I was in the Staff Judge Advocate's office, so I was away from him. I was working for a man named Colonel Chet Taylor. Colonel Taylor was a gung-ho military guy. He really wanted to get young captains to stay beyond their first tour, and so he worked very hard on the four of us he had at that time, as I recall--I think there were four of us in our office. One actually did stay and made a career of it. But I wasn't very interested, and so he began to try and tell me that I ought to be interested because he knew that Elaine and I would like to travel, and we had one child at the time. That would be good for all of us.

So he was able, through channels that he had, to find out that my next assignment would be either what was known as an unaccompanied assignment, meaning I would go alone and leave my family behind. That would be to Guam. Or, I had a chance at an accompanied assignment to a place called Misawa [spells] Air Base, which is up near Sapporo [spells], Japan, which you may remember because of the name of the beer that goes with Sapporo, but what I remember more importantly is, it's where they had the Winter Olympics. So that was going to be a cold place, and I

didn't want to go to a cold place. I didn't want to go to Guam alone either, and I didn't want to go to the Philippines.

So all of Colonel Taylor's efforts were for naught, and I got out.

II EAST BAY MUNICIPAL UTILITY DISTRICT 1972-1992

Interview with Jack Reilley

Maddow: But I had started in late 1971 to look around a little bit. I was thinking at that time that a job for a public agency would make some sense, but I was more focused on county counsel's offices, you know, the lawyer for a county. I actually went up and interviewed with the county counsels in Sonoma County and in Marin County. They didn't have job opportunities that coincided very well with when I was getting out, however, so nothing materialized out of that.

But through that process, I'd been back in San Francisco, and I went over to Hastings Law School to the placement service and put my name in, and did some things like that.

In the meantime, I was independently pursuing some opportunities I had found out about in district attorneys' offices. A lot of lawyers start there; that's where you can first get some trial experience. At that point, I thought, Well, maybe, although my military legal experience had convinced me I really wasn't a trial lawyer. But I had submitted the papers and actually gone through an interview for the San Mateo District Attorney's office, and had a job offer that was pending.

At about the time that offer was made to me, I was contacted by the Hastings placement service, and they said, "Somebody has

taken a look at your application and your resume and would like you to come to a preliminary round interview." I said, "Who is it?" And they said, "Well, it's East Bay MUD." And I said, "What?" They explained it to me, and it still meant nothing to me. But I said, "Well, send me the papers."

What fascinated me was that this was going to be an interview the likes of which I'd never heard of before. Instead of a situation where I would go in and talk to some person who would be interviewing me, I would go in along with five or six other people, and we'd go through what I jokingly told Elaine was a group therapy session with somebody who would decide whether or not they wanted to hire one of us. Well, I was fascinated by it, and I wasn't threatened or anxious, because I had the San Mateo County job offer. And so I said, "Oh, what the heck, I'll do it," and they said they would pay my way. I think in those days you could fly up and down the coast on PSA for nineteen dollars or something.

The person I was speaking to at East Bay, once I decided I would do it, was a man named Clark Sharick [spells]. And Clark was saying, "Well, this is going to be very early in the morning, and we'll put you up in a hotel." I said, "Well, actually, what I would like to do, if I can make the logistics arrangements, is to fly up and stay with my wife's sister," who was living in San Francisco at the time. So I did that, I flew up late in the afternoon the previous day and had dinner with her, and then it turns out Clark Sharick also lived in San Francisco, so he said, "I'll stop by and pick you up."

I remember two things about it, it's funny. He had a Porsche. It was funny, because I knew nothing about Porsches, but this one was a very distinctive color, and the one other Porsche I'd been in, probably ever before then, was the same color. And so I said to him, "Oh, this is Bahama yellow." [laughter] Well, he thought that was just great, so right away, he and I seemed to [hit it off].

And then I remember he took me into the cafeteria, because he wanted to get a cup of coffee before we went to this interview place. I remember looking around and it looked like an old barracks building, and I thought, What is this? A steam table and all. I had no idea what I was getting into.

LaBerge: And was he in the legal department?

Maddow: No, Clark was in the personnel department, and he was the person who was running this particular exam. This was their form of exam.

The interview turned out to be, I think there were five or six other people, I think all men, as I recall, each of whom was interested in this job opening. The people who were doing the interviewing included Jack Reilley, and a man named Mack Carter. I don't remember what Mack's job title was back then, but he was a pretty high-ranking executive at the district. And a man named [Ed] Lane.

I think it was Ed Lane, who at that time--maybe still, I guess--is in the county counsel's office up in Contra Costa. They brought him in to be an outside interviewer.

The interview process was one in which they had a series of questions and ideas that they would throw out to us, and each of us was supposed to address whatever these matters were, sort of in turn, and without stepping on one another. This was not supposed to be like elbowing each other out of the way. And I found it very interesting, because I was very relaxed. Most of the other people were uptight. I'd had four and a half years in the air force by then, and I didn't get intimidated by facing legal issues. I had developed a kind of a results-oriented sort of problem-solving approach to dealing with issues like that. I thought the interview was great fun, and I thought to myself, They'll never be interested in me. I'm too relaxed, or laid back, or something.

So the interview ended that afternoon. Then I had a one-on-one session with Reilley later on during the day, as did each of the people, and I was one of the last ones, as I recall. Then they gave me a little chit and put me in a taxicab, and I went back out to the airport and flew back to Hermosa Beach, and told Elaine, "There's no chance I'll get that job, so I guess we'd better start looking for an apartment in San Mateo."

The next day, Reilley called me and he said, "I want you to come up here and take this job." [laughter] He wasn't quite that blunt, but we--he and I had kind of sparked right away. There was easy communication between us. So I really didn't think twice about it. It looked to me like something that meant that I would not be a trial lawyer trying burglaries for the next two years, which frankly wasn't all that appealing to me. I didn't know very much about what a water utility was, but I could tell from talking to Reilley, Mack Carter and Clark Sharick, and in particular a little bit of the interchange with Ed Lane about what he saw about what the East Bay MUD job was, that there would be a lot of variety, and that it would be business-oriented, transactional-oriented as opposed to litigation-oriented, so I said, "Let's try it." For two years, how can you go wrong?

Describing the Office

LaBerge: And was that--was it going to be two years?

Maddow: No, that's what I thought. Two years--. I knew they had a probationary process, and I figured I wouldn't have too much trouble surviving probation, but I figured, I'll give it a try for a couple of years. Because that's what I had always thought I would do in a D.A.'s office if I went there for openers.

Well, as it turned out, I had so much fun that I stayed twenty years. [laughter] When I first went there, I really

wasn't sure what I was doing. I had a pretty good idea of who I was and what it meant to be a lawyer, but--

LaBerge: What was the job description?

Maddow: At the time, the district had two other lawyers in the office besides Jack Reilley. One of them had been there a very long time, maybe twenty years, almost twenty years. One of them had been there like five years. Each of them did a little bit of everything. I was the new person who came in as what was called in those days an assistant attorney, appointed by the board of directors to serve at the pleasure of the board to do the legal work of the district under the direction of Jack Reilley.

LaBerge: Who were the other two?

Maddow: Frank Howard, whom I think you know, and a man named Wayne Witchez [spells]. Wayne, I think, is dead now. They were the three-person legal staff for the utility district at that time. Frank had primarily responsibility in the areas related to the district's wastewater department. You know, East Bay has the big water function, but it also has a very big wastewater department, and wastewater activities were very busy then. And Frank also did a lot of work with the district's personnel and human resources type issues and that sort of thing.

In those days, Jack Reilley--he didn't carve out hard and fast pigeonholes quite as much as he had to in later years as the legal work increased. And certainly not as much as I did later on, because the pace and volume of legal work continued to spiral upward during the time I was general counsel, and we'll get to that later. But Frank was clearly the number-two person. He'd been there with Jack a long time. Wayne had been there for a shorter period of time, and Wayne was like the office pitbull. Wayne was the guy who would go off and handle defense matters, and take on construction contractors. Wayne loved to get in there and just fight. He was kind of a street smart guy, and was very effective in his own way. He wasn't a master of the written word or anything like that, and sometimes he got his tongue all

tangled up when he was speaking. But he had a very quick wit, and he had a real good litigator's instinct. He was an aggressive guy, and he knew a lot of stuff. So he was a pretty effective fellow there.

I was the first ever number-four lawyer. When I went there, there was no place for me to sit, because they had not needed a fourth office then. So during the first several weeks that I was there, I sat in the library as the district's carpenter staff, I guess, was remodeling the place a little bit to carve out a new office and give me a place to sit.

I remember being back at this old sort of Formica-topped library table with a hot plate. A woman who was no longer in the office, she had been until--I don't know, not too many months or I guess years before I came there, but that was where Myrtle cooked her lunch. [laughter] I just have this sort of vague recollection of that.

CEQA, NEPA, and ACWA

Maddow: When I first was in the office, the first thing that I did was to try and learn a little bit about what a water district was all about and what it meant to be a lawyer for a water district. I fairly early on began to work on some contract problems, because Jack knew I had a background in contract work with the air force. I had gone to work there in May of 1972 and in June of 1972, the state supreme court decided a case called Friends of Mammoth v. Board of Supervisors of Mono County.[1] That was the first case in which the California Environmental Quality Act was interpreted by the state supreme court as having very broad significance in regard to decisions made by government agencies. Until that case, there had been a perception, I guess, that the Environmental Quality Act was meaningful primarily for public

[1]8 Cal.3d 247

works projects, but in the Mammoth case, the supreme court said that a public agency--in that case, the board of supervisors--needed to evaluate the environmental impacts of a private project--as I recall, it was a hotel project--prior to granting some land use approval.

That came as a bit of a shock, and it was sort of the opening of the era of what we now know as environmental law in California state law. The Environmental Quality Act had been enacted I think in 1969 or 1970--

LaBerge: This is the California one?

Maddow: The California Environmental Quality Act, or CEQA.[1] It was sort of in the aftermath of the National Environmental Policy Act,[2] NEPA, which had been enacted a few years earlier. California, like a lot of other states, enacted its own environmental protection statute. They were commonly called "little NEPAs" in those days. And California's little NEPA was thought to be narrower in application and significance until this case.

Well, Jack realized that this case was going to be important, because the district had a fairly ambitious program ahead of it in terms of its public works needs, and he could see, I think, that the new era of environmental law was going to change the way in which the district would be able to go about meeting those public works needs, and so he wanted somebody to get involved, and I was the one he picked.

Now, at the time I went to work for the district, it had already signed the contract with the Bureau of Reclamation for the American River water. That was signed in 1970. And in 1972, when I went to work there, the district had an American River project team, and in fact had already hired a consultant--the

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[1]A.B. 2045, Environmental Quality Act of 1970, 1970 Reg. Sess., Cal. Stat. ch. 1433 (1970).

[2]National Environmental Policy Act of 1969, 83 Stat. 852 (1970).

name of the firm was Jones & Stokes, they still exist--to write an environmental impact report on the right of way for the pipeline to bring American River water from the Folsom South Canal up in Sacramento County down to the district's service area.

So it's not as though the district didn't understand CEQA, and that they were going to have to comply with it, but the concern was that with this supreme court decision, CEQA was going to change, and the utility district needed to be aware of it. And so in the aftermath of the Mammoth case, there was a fairly extensive effort in the California legislature to amend the statute to try and provide a road map to public agencies as to what this broader statutory application was going to mean. How do public agencies apply CEQA now that we know it's got broader application? And there was a bill that was introduced by the assemblyman who was from Richmond, his name was Jack Knox, John T. Knox--

LaBerge: Okay. He was one of your mentors?

Maddow: Well, in a sense, yes.

LaBerge: Or you learned something--

Maddow: I learned a great deal from him. Mentor is a little too strong, but certainly someone from whom I learned a great deal, and from whom I benefited from contact. It wasn't always favorable contact. Now, actually, I guess I could say that we're on a pretty friendly basis, but there were some tough times at the beginning.

But Knox was--at that time, I believe he was the chairman of the Assembly Local Government Committee, and that's why it fell under his domain. He had as a staff assistant a man named Tom Willoughby.[1]

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[1]See Thomas H. Willoughby, an oral history conducted in 1988, for the California State Archives, Regional Oral History Office, University of California, Berkeley, 1990.

LaBerge: We have an oral history with him.

Maddow: Oh, that's wonderful.

Tom was the staff guy who was heading up Jack Knox's effort to deal with the act.

There's a water industry trade association that in those days I think was still known as the Irrigation Districts Association. It's now known as ACWA, the Association of California Water Agencies. ACWA had a state legislative committee, and East Bay MUD was very active in that committee. Its lobbyist in those days was a man named Rod Franz [spells], who was an All-American football player at Cal and is sort of a legendary character, and we can talk some more about him. Between Rod's activities with that association and another association called CMUA, California Municipal Utilities Association, of which Jack Reilley headed the Legislative Committee, there were quite a few opportunities for the district to become involved in helping to shape that piece of legislation.

Our concern was that there was going to be a great deal of attention paid to cities and counties which have land use authority over the development of land, subdivisions, et cetera, and that's where there would be a lot of attention paid to environmental impact reports, environmental documentation, consideration of environmental effects. Here's this water district that wants to build this pipeline across hill and dale, knowing full well that there would be environmental considerations that would enter into it. And in addition to that, it was a water agency that even back in the seventies was facing questions about urban development and growth, and one of the issues that was starting to be heard way back then was, what's the relationship between providing water to an area where growth is proposed and approving, or dealing with, the growth itself? So one of the principal--

CEQA Guidelines and Evolution of Environmental Law, 1972 ##

LaBerge: Okay, the relationship between providing the water and dealing with the growth itself?

Maddow: Yes. The cities and the counties dealt with whether or not a particular subdivision met with their zoning and planning requirements, et cetera. But what we were faced with was, Is there a water supply available to serve those subdivisions? Or, are there water facilities available? I can remember participating in these meetings where here I was, this young kid who barely knew what a water utility was, standing up there talking to Tom Willoughby and the people from the California Real Estate Association and the Farm Bureau and whoever else. They'd be talking about the issues that would be of concern to them, and I would be saying, "Now, one of those subdivisions has to have a water tank, and the only way you can build the water tank is you put it up on top of the nearest hill, where it's conceivably going to be an eyesore. Now, who worries about those environmental impacts, and how does that process work?"

So that was a part of the discussion of how something that's called the "lead agency principle" evolved, and I was very much involved in first the legislation and later the evolution of the state regulations, called the CEQA guidelines, on what the relationships are between water agencies, as an example, or sewer agencies, and general purpose units of government--cities or counties--in regard to land use matters. The principle is that, since it's the land use that is really the driving factor, the city or the county ought to be the lead agency with the primary responsibility for dealing with all of the environmental impacts of a proposed land use. The water agency ought to be a "responsible" agency to deal solely with the environmental impacts of getting water to that subdivision, or getting wastewater, dealing with wastewater services or what have you.

The idea was that the water agency should not become a small tail wagging a great big dog, because we were always afraid that

that would happen, and what we didn't want to have happen was a city or a county saying it's okay to build this big subdivision, but oh, by the way, water hasn't been dealt with, and then the environmental impact report or other considerations related to the water facilities become the focal point of the concern about whether this big activity is going to go forward. In those days, the worst case scenario that you thought about was, if you can't get your water facilities in, do you end up effectively with the utility buying the property or being sued for inverse condemnation, because it hasn't done its thing properly or in a timely fashion, and therefore, the query as to whether that's a taking of the private property.

We now know that it would not have been. Inverse condemnation law and the law of takings has evolved. But in those days, we didn't know all that, and so we had to be concerned about some worst case scenarios.

I've dwelled on all of that because it's important to me, from the standpoint of the evolution of my time at East Bay in a couple of ways. First place, it allowed me to get in on the ground floor of environmental law in the state and for East Bay, and I think that's important because environmental issues have been very significant to the East Bay ever since.

Second, it gave me an opportunity to develop sort of a network of people with whom I could relatively easily communicate throughout the water industry, and at least for a time, in state government. Tom Willoughby was one of them. He was one of the most capable legislative staff people I ever met, and is now a very capable lobbyist for PG&E. I guess that's where he still is; I haven't seen him in years.

Assemblyman Knox was one of the best, in my opinion. He didn't always agree with what East Bay MUD was saying or what I was advocating, but I always thought he was an absolutely outstanding legislator. The people I worked with in this ACWA group were primarily lawyers, and some managers; I was very fortunate in that I was able to develop some relationships, some

of which I've maintained right through to today with people whom I consider to be part of the network of people I deal with in the water industry, people up and down the state. And it goes back to those early days in '72 and '73 dealing with the CEQA amendments in A.B. 889[1] and then the first efforts to develop the state EIR guidelines.

LaBerge: So it's A.B. 889?

Maddow: I believe it was A.B. 889, and then--

LaBerge: In '73?

Maddow: I think it was in '72.

One of the things that the bill did was to provide that the state government would issue regulations that would further interpret and implement CEQA, and the process of development of those regulations was also quite intense, quite active, and I was pretty well up to my hips in that one as well. And again, the ACWA group was instrumental in that.

Political Reform Act of 1974

Maddow: That formed a kind of a pattern, and a few years later, for example, just to digress further, after Watergate in '73, I guess, there was an initiative called the Political Reform Act that was approved by the voters in 1974. This was a very comprehensive initiative, unlike most of the ones we've been living with ever since. But what that did, I believe it was called Proposition 9 in 1974,[2] it was written by two people who

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[1]A.B. 889, Amendments to Environmental Quality Act of 1970, 1972 Reg. Sess., Cal. Stat. ch. 1154 (1972).

[2]Proposition 9 (June 1974).

worked for then Secretary of State [Edmund G., Jr.] Jerry Brown, a man named Bob Stern and a man named Dan Lowenstein. I've forgotten what Bob Stern does now. I've come across him since then, but I've forgotten. Dan Lowenstein now teaches at UCLA law school.

But the Political Reform Act involved trying to clean up California political life, I guess I would say. That was from the perspective of Mr. Brown. It dealt with issues of conflict of interest, campaign expenditures and disclosures of campaign contributions, and matters like that. The conflict of interest chapter required every public agency to have something called a conflict of interest code, which in essence was intended to require officials of local agencies to disclose their investments, their income, et cetera, and to disqualify themselves if they ever had the opportunity to participate in government decision-making that could have an influence or an impact on a business entity in which they had an investment, or a real estate investment, or a source of income to them.

Here again, the legislation, which was by initiative, called for the adoption of regulations, and the ACWA group became one of the major spearheads for trying to sort through the regulations, in particular on conflict of interest. Our concern was that water agencies would be able to continue to make decisions in spite of, or in compliance with, or whatever it was, that whatever the implications of this new statute would be. None of us knew at the time. It looked huge and very imposing.

As I say, the two authors of the Political Reform Act were Dan Lowenstein and Bob Stern. The act created the Fair Political Practices Commission. Dan was its first chair, Bob was its general counsel. We worked closely with them in evolving these regulations. And I'll just give you one quick example to give you an idea of what we were talking about.

Suppose you had a water agency official who held stock in his or her personal investments in the PG&E company. And let's assume that the water agency, as many do, had business

transactions with PG&E. A water agency that buys its power to run its pumps from PG&E is probably not going to have very much of an impact on PG&E, because they're just another customer. On the other hand, what about a water agency that generates power and sells it to PG&E? That could be a pretty significant financial transaction.

The Fortune 500 Test

Maddow: So the water agency group spearheaded the effort to make sure that the conflict of interest law was applied to things that were relevant to the particular agency's field of jurisdiction, and to make sure that we weren't picking up nickels and dimes, because that might be more constraining than the authors of the statute or the voters intended, but instead to pick up things that had a material financial effect. Those were the words of the statute.

And we helped to evolve tests. For example, if the entity that you're interested in is a very large entity, the water agency group, myself included, said things like, "We don't want to pick up the nickel-and-dime decisions. We want to pick up the things that mean something to them." And the bigger the corporation, the bigger the impact needs to be, and we were the ones who authored something called the Fortune 500 Test. If it's a Fortune 500 corporation, then the impact needs to be big, a million dollars or something. Whereas if it's a company with annual business of $100,000, a $1,000 transaction is material. So we were trying to say, "Let's make sure that everything is targeted and focused, because then the result--trying to achieve political reform--can be achieved in a meaningful, rational way that we can explain to our clients, and we can work under this law," which all of us knew was a heck of a good idea.

Reilley let me go work on that stuff. Reilley knew that in the long run, it was going to have a big impact on the utility district. He didn't say a whole lot about these things, but as I

would talk to him about these things, there's no question in my mind that he had a great vision of what the utility was, what its role was, how it was different from other utilities like those that get their water supply from the state or the federal government. It was independent. It stood all by itself. How it was different from cities and counties. Had to relate to them, but it was different from them. Stood all by itself. And so he knew that as environmental law was evolving, and as this new political law stuff was evolving, it was going to be important for the utility district to understand it to the extent that the utility district was able to see things because of its independence that maybe others didn't see, that we needed to be able to take a role in shaping the way it all worked. He was willing to let this new, wet-behind-the-ears lawyer who still didn't know very much about what a water utility was, he was willing to let me go and spend a lot of time working on that kind of stuff.

And it was an enormously valuable education, because it forced me quickly to learn more about the utility and the utility business, and it gave me a sense of how the utility and its business related to the rest of the world. I mean, when we were doing these things on the CEQA guidelines or the statutory amendment, or the FPPC guidelines, there was interaction between the lawyers and the lobbyists for the water agencies, and the people from the League of California Cities, and the California Supervisors Association, and private industry, and the real estate association, et cetera. And that's a great education in terms of how stuff works. I have always really appreciated Reilley's having let me get that education. I've spent way too long in this interview talking about all that--

LaBerge: No, this is fascinating, and it's wonderful. It gives a bigger picture of what the utility is. I remember going to my first interview with Mr. Raines thinking that all we were going to talk about was water law. I had no concept about everything that you have to do, including politics.

Maddow: Well, I have a story about that. People ask me a lot why I stayed at East Bay MUD for as long as I did, and my answer is that I'm not a litigator, but in the almost twenty-one years I was at the utility district, I saw a little bit of everything. I'm not a litigator, but I was in court in everything from a criminal law case to a divorce case, and my client was always the utility district. I don't know too many people who had that kind of variety working in a public agency, and in particular, a water utility. But I had an enormous variety, and I have to say, it was that sort of constantly changing tableau of files stacked on your desk that more than anything else made it an interesting place to work. That, together with the fact that we were working on some stuff of enormous significance.

The other thing that happened in the first month that I was there, besides the Friends of Mammoth case coming down, was that the legal challenge to the district's American River contract was filed. That also happened I think in June of 1972, when the Environmental Defense Fund and some individuals sued the district to challenge its contract. That case is still alive today, and I know Mr. Reilley would have talked a lot about that, and I know you and I will also. But that case involved sort of the cosmic levels of water law and water policy, and that was all going on at the time--it started just after the time that I arrived at the utility district, and as I say, is still going on today. It's one of the things that Reilley will always think of as being one of the most important things he worked on in his career, and I feel the same way in my career, and of course, so does my successor, Bob Helwick. [tape interruption]

Establishing a Network of Water Lawyers

LaBerge: Well, in working with the lobbyists and ACWA to help form both the Fair Political Practices Commission and the other guidelines, did you have to go up to Sacramento? Who else did you work with?

Maddow: Most of the work was done in Sacramento. This was before we had the fax machines, and so we used the mail and telephone. But we did work extensively in Sacramento. In all three cases--the CEQA amendments, the CEQA guidelines, and then later, the Fair Political Practices Commission guidelines--ACWA had as its executive director and general counsel a man named John Fraser [spells]. John was very much involved in all of that. There were others. There was another association, CMUA, and as I recall at that time--John Fraser's counterpart over at CMUA, which was a smaller organization, was Jerry Jordan, as I recall. Rod Franz was East Bay MUD's lobbyist; he was involved in everything having to do with the legislation. He worked for John Plumb [spells], who was the secretary of the district. And so that was sort of the internal team.

Externally, there were lawyers from all kinds of places. A man named Bob Jones from Price, Postel & Parma in Santa Barbara. Is that the kind of name you're interested in?

LaBerge: Yes, and if you have any anecdotes about them, or some of the names that you gave you before, like Art Littleworth: was he involved?

Maddow: Art was involved to some degree in these activities. So was one of his partners at Best, Best & Krieger, a man named Dallas Holmes, who is now on the superior court bench down in Riverside County.

LaBerge: Did you work with Jerry Brown?

Maddow: No, we didn't actually have direct contact with him, but we did a lot of work with in particular Bob Stern, who had worked for Jerry Brown in the secretary of state's office. Dan Lowenstein and Bob Stern were in the secretary of state's office when they wrote Proposition 9, the Political Reform Act. Now, whether they did it on state time or not, I don't know, but it ended up--you know, in the aftermath of Watergate, it was an easy thing to pass.

We had a fair amount of contact with lawyers from up and down the state. For example, the Metropolitan Water District of southern California had a lawyer named Jarlath Oley [spells]. Jarlath had gone to work at the Metropolitan at about the same time I went to East Bay, and he was thrown in in sort of a similar way by general counsel of the Metropolitan, John Lauten [spells]. And then Art Kidman, from a firm down in Orange County, was very much involved, along with a man who's now his partner, Russ Behrens [spells]. They represented urban agencies in southern California. Jim Ganulin [spells], was at that time the assistant general counsel, later the general counsel, of Westlands Water District, the biggest of the Central Valley irrigators. Jim was involved with all of that. Jim was a former deputy attorney general, and so he had particularly useful knowledge about how state government worked.

LaBerge: For the most part, did you all within the water lawyers agree as to how things should be, or did you have disagreements?

Maddow: No, we had disagreements. Frequently, it was--things were more difficult for the people who represented agricultural agencies, because people who were on boards of agricultural districts are landowners, and therefore, these conflict of interest issues were very difficult for them. And of course, in the environmental arena, those were areas that were far more conservative, much less likely to be attuned to these environmental theories and trends and all of that. So we did have differences of opinion.

One of the things that really impressed me was that there was a man from up in Oroville named Jack Minasian [spells], who was an older gentleman, and the word "gentleman" should just be underscored. He was a true gentleman. He became involved in some of the activities related to the Environmental Quality Act amendments. He and his clients didn't really understand all of that, but Jack knew that it was important, knew he had to become involved. He had a very courtly way about him, and I can remember having these discussions about how these new--sort of newfangled ideas--he didn't use those terms--were going to work in the communities that he was familiar with. I remember those

discussions; they weren't really debates, but discussions. They gave me a sense of, Gee, what we know down here in the East Bay--after all, we represent places like Oakland and Berkeley where you have sort of hotbeds of progressive thinking--it isn't that way everyplace else, and we have to make sure that when we're talking about the community of water agencies, we have room for both sides of that spectrum there.

So you asked for anecdotes: I'll tell you one. There was a man named Ed Koupal [spells]. He headed an organization called the People's Lobby. They were very much involved with Proposition 9, the Political Reform Act, he and his wife Joyce. We were working hard at the conflict of interest issues, and he was primarily focusing on the campaign disclosure stuff as we would go to these hearings at the commission on their proposed regulations. Five or six of the lawyers from the water community would walk in, and we'd sit together, and we'd be waiting for our agenda item, and then we'd all have something to say.

He wanted to get to his issues, and sometimes, when we were debating our issues, it would take a while, and he wouldn't get to his issues. And one day, he got very frustrated with us, and he finally stood up. He interrupted the hearing, and he said, "My wife and I came here because we're really interested in this other set of issues that's further down on your agenda, and we're sick and tired of hearing from"--and he jerked his thumb over his shoulder in the direction of those of us sitting over there--"we're sick and tired of sitting here listening to the guys in the gray suits." And we sat there and we looked, and sure enough, every one of us had on a gray suit that day. We thought to ourselves, Oh, my gosh, we're really typecast now. And Ed Koupal--that was the only time I think we ever communicated with him.

About that same time, there was the head of the staff of the Fair Political Practices Commission, I guess he was probably called its executive director, a man named Rudy Nothenberg, who is--

LaBerge: Still in the news.

Maddow: Still in the news. He was chief administrative officer in San Francisco, and now I think he heads--I've forgotten which of the city commissions or departments. A lifelong public servant, and a very articulate guy in a way that is interesting. He has an accent which I guess is English, and he has a very rich speaking voice. I can remember one time, I got up to make a presentation on a part of the ACWA pitch on some aspect of the conflict of interest regulations; I was really frustrated, because we had been debating some issue, and the commission had decided against us, or the staff had argued against us, or something like that. And I started in to my pitch on the next issue, and I think I got the two issues a little bit bollixed up or interwoven. I probably wasn't as articulate as I wanted to be, so I just stopped. I was kind of composing myself for a second, and Rudy Nothenberg said, in his deep, very beautiful speaking voice, he kind of cleared his throat and he said, "It's a little hard for me to respond to that." [laughter] Everybody laughed, and it broke the ice of the moment, and I went on with my presentation, and it was just fine.

But things like that. We were having some pretty difficult wrangles in those days, and yet, between the courtliness of a Jack Minasian and the feistiness of an Ed Koupal and the style of a Rudy Nothenberg, I have to say, I think we did good work. I think what happened with the Environmental Quality Act and the CEQA guidelines and the FPPC guidelines, because of all that effort by a lot of people who really focused on it back then, they're still viable matters today. I mean, each of those sets of regulations, and the statutes, and things we did, still have continuing viability, and they're just part of the everyday routine of being in public agency life any longer. So as I say, that's all part of the education.

John Plumb, Jack Knox, Rod Franz

LaBerge: Who would you need to check with at the district before you went to these meetings?

Maddow: Generally Jack Reilley. John Plumb, who headed up the district's activities in the legislature. He was the secretary and had as his responsibility--I don't remember if this was his title--but he was sort of the manager of the district's legislative affairs. The lobbyist reported to him, and he and Jack worked very closely together, and the general manager in those days, Jack Harnett, knew that Jack Reilley wouldn't do anything or allow anything to happen that would not be in the best interests of the utility district. He trusted Jack a lot.

But John Plumb and Jack Knox didn't see eye to eye on a lot of things. I think that's largely because John had spent his career kind of working on the Republican side of politics as it existed back then in the sixties and the early seventies, and Jack Knox was one of the leaders of the Democratic party. There were times when the Contra Costa County Republicans and Jack Knox, who was the leader of the Contra Costa County Democrats, the Bert Coffey wing of the Democratic party, they crossed swords. And Jack Knox usually came out the winner, so I suspect John Plumb and he didn't see eye to eye very often.

I can remember one day when there was going to be a hearing on A.B. 889 someplace down in Los Angeles, and Knox was flying down, and as it turned out, John Plumb and I were flying down for the utility district on the same plane. Knox and Plumb had one of their typical sort of acerbic exchanges as we were in the terminal, but I had a particular issue I wanted to talk to Knox about, and I got the opportunity. I think Knox had seen me in action a couple of times, and I was able to talk to him on a real businesslike level, because I stayed away from the politics of things. I began to understand early on what lobbyists and so-called governmental affairs people did, and I knew I didn't do that and didn't want to. So that was one of the times when I

pretty much was following the direction I got from Jack Reilley, and was kind of given my head to try to accomplish the objective through persuasion.

One other aspect of all of that that I think is interesting, especially since this is a UC effort: Rod Franz was the district's lobbyist, and Rod was extremely successful as a lobbyist. It was because he never, ever told anybody anything that was anything other than 100 percent truth. He never, ever shaded things. He wore his feelings on his chin, and he just was the nicest guy in the world. And here was this guy, he was the only three-time All-American football player in the history of the University of California. That was after he'd come back from World War II, where he had--I don't know if it was an injury or a wound or what, but his voice box had been cracked, so he has this real raspy voice. And Rod is not an issues guy. He wouldn't be the one who would go in and lobby the issues for East Bay, because he didn't always understand them. But because everybody trusted him, and they knew that he would--

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LaBerge: Okay, he could open any door in town.

Maddow: Right, and for a couple of years on, in particular, the environmental law issues and the Political Reform Act issues, Rod would get the door open, and I would be the one he'd push through. So the two of us became sort of the spokespersons for the utility district on those issues, and we were a good tandem, good team. Rod used to take me to all of the meetings of the state legislative committee of ACWA, and that helped me again to form these relationships that resulted in my having a kind of a network of lawyers with whom I have been dealing ever since. I still deal with many of those people in my capacity where I chair the Legal Affairs Committee for ACWA, and it's largely because the people who are on that committee are people whom I started to get to know back through those processes in the mid-seventies. [tape interruption]

Board of Directors

LaBerge: What about any dealings with the board of directors? Did you have to go to any board of directors' meetings and say, "This is what I'm doing up in Sacramento," or--?

Maddow: The utility district board during the times we've just been talking about was a five-person board, and the members of the board were elected at large, even though they had to live in individually drawn districts. That's in direct contrast to now, when there are seven directors and they not only live in those districts but they're elected from those districts. So back then, they ran in front of a million people, whereas now it's 150,000 or something like that.

The principal difference between that older board and this board is that older board looked at things that were of broad concern to the whole district. They didn't ever think so much about my ward versus somebody else's ward. The way in which matters were presented to the board mirrored that. They did the regular business of the district: awarding contracts and all that. The Political Reform Act issues or broad environmental law issues or these kinds of things would be brought to them in the context of something that is of district-wide concern. And so occasionally, Jack Reilley would have me make a presentation, usually a brief one, about summarizing what was going on, how these issues worked, what the implications were for the utility district, how the utility district was working with other segments of the sort of political marketplace.

Now, sometimes I'd brief Jack and he'd do it, and other times, he would actually have me become involved. In those days, if you went to a utility district board meeting, you would typically see a lot of staff there. We went through a period during my time at the district when that wasn't the case. We had a subsequent general manager who wanted to limit the number of staff there. But in the days when Jack Harnett was general manager, if there was something on the agenda that was of concern

to you as a staff member, you would go to the meeting. So I relatively frequently went to board meetings, developed a pretty good sense of the ebb and flow of what happened at those meetings, did not pinch-hit for Jack. If anybody--if Jack was going to be away, or if he was ill, Frank would be the one who would pinch-hit, because he was the senior person after Jack.

But Jack gave me a lot of assignments on things that directly involved the board of directors. For example, in local agencies, you always have to deal with something called the Brown Act,[1] which has to do with what are called the open meeting requirements, and how your agenda is set and those kinds of things. Over the years, I think I probably had more of those issues than the other lawyers did, and then in later years, I had them all.

Brown Act Requirements

LaBerge: Can you give me an example?

Maddow: I'm a little hard pressed to think of a real specific instance, so I'll need to generalize a little bit. The Brown Act was passed to keep public agencies from doing business behind closed doors. Over the years, there were cases that came down that had to do with what you could do in a closed session, because it was an attorney-client privileged matter or something like that, and what you had to do out in front, what you had to put on your agenda, that sort of thing. It's much more specific now. The law is just very tightly bound up in all these little pigeonholes.

But Jack had me watch those areas of the law, or maybe he allowed me to watch those areas of the law. I can't remember

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[1]A.B. 339, 1953 Reg. Sess., Cal. Stat. ch. 1588 (1953), Government Code Sec. 54900 et seq.

that he said, "You do this." And I would keep him advised and keep John Plumb advised so that the agendas were written in a manner that was consistent with the law, and so that at the times when it was time for the board to discuss something in closed session, you would check to be sure it was being done right. It wasn't anything like the degree of intricacy that that subject area of the law is now, but it was something that had a lot to do with the way the board of directors functioned. Jack let me observe all of that, or participate in a great deal of that.

Helen Burke's and Ken Simmons' Contributions

Maddow: Then in the mid-seventies, there was a big change, because that's when the legislature passed the statute that changed the East Bay MUD board from one that was five people elected district-wide to seven people elected ward by ward. And for the first time, we began to see, I guess I would say, regular majority and minority views on matters that came before the board. It began right away, with the first election after the statute had been passed, when a woman named Helen Burke was elected to the board.

Helen had been a critic of the district. She was an official with the--not an official. She was involved with the Sierra Club. At that time, I don't know whether she held an official position or whatever. But she was elected from the Berkeley ward, and frequently disagreed with the majority of the board on a number of issues.

For example, in 1972, the litigation had begun over the implementation of the American River water supply contract. She sided with the people who were opposing the district's efforts to develop that contract. They were people whom she knew through various environmental organizations. In particular, a woman named Jean Siri [spells], who was one of the four individuals who was an individual named plaintiff in that case. She and Helen Burke were friends, and political colleagues, that sort of thing.

Jean Siri later served on the city council in El Cerrito and has done a number of things in political life. Her husband, Dr. Will Siri, was one of the founders of the Save the Bay Association. [Jean Siri later was elected to Board of EBRPD].

LaBerge: Okay, that sounds familiar.

Maddow: I think you've done some things on them.[1]

LaBerge: Yes.

Maddow: He was very much involved with the creation of the BCDC.

Anyway, Helen was frequently at odds with the rest of the board. I was the lawyer who I think she maybe developed the ability to communicate with more so than the others. And I think that she saw Jack as being the board's lawyer, and me as being a lawyer who worked for Jack to whom she could talk a little more easily. She might not see it that way or say it that way, but I always had the feeling that--she didn't always like what I had to say, but she talked more easily to me than she did with Jack, on some things.

Early on, when the Environmental Defense Fund had brought this litigation against the district, Jack was handling the case. I was not really on point in the litigation, although I did some writing and some of the--that case was all done on the papers in the early days. It wasn't being tried in the courtroom at all. That came much later. I had something to do with the papers early on; we all had a piece of it. But it was Jack's case.

But occasionally, as environmental law was kind of getting started here, there were various and sundry meetings that I would want to go to on behalf of the utility district so I'd know what

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[1]See William E. Siri, "Reflections on the Sierra Club, the Environment, and Mountaineering, 1950s-1970s," an oral history conducted 1975-1977, Regional Oral History Office, University of California, Berkeley, 1979.

was going on, and Jack would say okay. And I got to know Tom Graff, who was the Environmental Defense Fund attorney--whom you know, of course.[1]

LaBerge: Yes.

Maddow: And a man named Dick Gutting [spells], who was in those days in the fund. I early on developed the ability to communicate with people in these organizations, even though they didn't necessarily agree with anything I was representing or anything like that, but at least we could communicate. And I think Helen respected that. Even though, as I say, I don't think she liked what I said all the time, I think that she knew that I would never deceive her, that I was going to play as straight with her as I would with anybody else on the board, and I think we formed reasonably healthy mutual respect. I'd like to think that still continues today, although I haven't really seen her in quite some time. But she's been gone from the East Bay MUD board for a while. I've had a couple of contacts with her since then. I always respected her for her having the courage of her convictions, even in the days when she was one of seven, and when the others were unwilling to be very accepting of her. I think Helen did--she didn't win a lot of votes, but in her way, she won a lot of battles. I think that her coming on the East Bay board was a very healthy thing. I think East Bay has been far better off in the years since the mid-seventies than a lot of other agencies from the standpoint of East Bay's sensitivity to environmental considerations, for example.

Another person who came to the East Bay board about then was a man named Ken Simmons, who's still there. Ken was the first black to come on that board. Ken brought the initial round of, I guess I would say, really serious concerns about diversity: diversity of the workforce, diversity of the way in which the

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[1]See Thomas J. Graff and David R. Yardas, "The Passage of the Central Valley Project Improvement Act, 1991-1992: Environmental Defense Fund Perspective," an oral history conducted in 1994 by Malca Chall, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1996.

utility district does its contracting for supplies and services and what have you. I have thought since early on when I got to know him that, of the directors that I knew at East Bay, he was the smartest, but unfortunately, he was not as interested in East Bay MUD as he was in the many other things he was doing. He was a faculty member at the University of California and had his own architectural firm and things like that. But he was smart, and when he put his mind to it, he could just be terrific as a director, as a problem-solver, as somebody who could get through whatever the political or technical or administrative details were. He always seemed to be able to do it. It's just that he didn't do it as often as I would have liked to have seen, because he was so good.

But as I say, what he brought to the board that was unique was, for the first time, causing the district to really have to face up to, both literally and figuratively, face up to issues of diversity. I think that Ken Simmons brought some just invaluable traits and characteristics and thought processes to the utility district. And there too, I think that the district has profited by having had somebody like him. Just in the same way that Helen Burke broke the ice in so many ways, he broke the ice in so many other ways. Split votes are healthy things, and having that loyal minority, or that other side of questions, that sort of thing: that's how you grow, as an institution.

So I was real fortunate to be able to see that from sort of an inside position and to work with those people. They didn't look to me for political considerations in regard to the issues they were involved with; they looked to me for legal considerations. They knew that, and I knew that, and sometimes, I had to say--I can remember sometimes hearing Jack Reilley say, "The legal considerations here are"--as opposed to the political considerations that are somebody else's to worry about. So a great education, to be there at that time when that set of changes took place.

Change in Board Elections

Maddow: Now, I have to say there is a flip side to it because I believe that when the utility district board changed from a five-person board to a seven-person board, in addition to it becoming modernized to some aspects of what I would consider to be more progressive thinking than might otherwise have happened, the district lost the ability to some degree to focus on the big issues of broadest concern district-wide. It's not that they didn't understand the issues; they knew that they were there. But the people who became the directors of the utility district after it changed to ward by ward elections were people who seemed to be focused more on the election process and election-related issues, that were usually more focused on their individual ward, than on looking at the broader view.

Big water supply projects are not done in four-year increments, they're done in twenty-year increments or thirty-year increments, or hundred-year increments. You've got to be able to take that real long view in order to succeed with the kinds of things that the utility district had done in the first fifty years of its existence. And some of that was lost when people came to the board with more of a focus on their individual ward, and what it would take to become elected or reelected there, or who would their successor be, et cetera.

I'm not saying one system was right and the other was wrong. But what I am saying is that, from the standpoint of the direction of the institution, and what it takes to be truly a leader of that institution, that kind of institution, that statutory change, from a five-person board elected at large to a seven-person board elected by ward, was like night and day. It was relatively easy with the five-person board, once they were convinced that they ought to go in a certain direction, to keep them going in that direction. With a seven-person board, getting them to focus on what that big issue was and remain focused on it was harder, because those seven directors had more pressures on

them in the limited time that they had to devote to utility district matters.

In the days prior to--in the fifties, for example, the utility district had to do something big and important, because the first phase of the development of the utility district all swirled around the water rights that they filed for in 1924. That project that they built in the twenties was built way bigger than they thought would really be necessary for a long time, but it wasn't nearly as big as what the need turned out to be, because along came World War II. And so as soon as the war was over, they went back and built the second barrel of the [Mokelumne] aqueduct. And in 1949, they filed the second water rights application. The big thing that happened in the fifties was to build--to lay the foundation for what became the second leg of the East Bay project--you know, the Camanche Reservoir, the second set of water rights, all those things that Harold Raines and Jack Reilley were so much responsible for. They had real leadership then, coming from the board of directors and coming from managers, all of whom were able to focus in sort of the old traditional way on how you did these things.

Those were the days when the utility district board knew it had to go to the voters to get a bond passed, a bond issue approved. And so they did it in the old-fashioned way: utility district managers became officers in the local service clubs, they went to the chamber of commerce; you made the rounds, you put together a committee of leading citizens. There was a retired admiral named Earl Hipp who headed up this committee, I've forgotten what they were called. They put together the 'Big M" project to build the third aqueduct and to build Camanche Reservoir and all of that. It was the kind of project that emanated from the downtown business leaders and civic leaders and the chamber of commerce, and those were the kinds of people who were on the East Bay MUD board. They were all business people.

In the seventies, things changed. And so when it came time to do something about the American River project in the seventies and on into the eighties, you didn't have that sort of focused,

sort of business community, chamber of commerce-type--that had all become much more fragmented over time. And within the utility district, you had a couple of choices as to where you were going to get that kind of leadership. You might get it from the board, or if you'd have a board that isn't going to provide it, then you might have to get it from a real strong general manager.

Role of the General Manager

Maddow: Mr. Harnett was from the old school of general managers, and probably would not have been allowed to step out and become the real champion, the real leader, the real visionary, for the utility district, because it wasn't as necessary and it would have been seen as being sort of out of character for the utility district.

Then the board changed. Mr. Harnett was still there, and he was doing his darnedest to make sure that the utility district stayed on track, in spite of all these changes that were going on, and there were lots of other pressures on the district as well.

When Mr. Harnett left in 1980, I guess it was, and Mr. [Jerry] Gilbert came in 1981, Gilbert was a guy who had done big things in the water business, and suddenly here was a general manager who was willing and able to be the big thinker, the visionary, to fill the vacuum that was left by the changing pattern, changing events that went way back to the sixties when the utility district had built the Big M project. Gilbert came in and tried to be that real strong leader. He needed to mobilize the support of the board. He could never get the whole board. The board was always divided. And so his efforts were not totally successful. And now, I don't know enough about the utility district to know where that vision comes from, where that leadership comes from today. I don't know if it comes from

within the management, or within the board, or a combination of them, or whether it exists at all.

But I'm convinced, from what I've seen from all the history I've read, that unless you've got some sense of what that vision is and some sense of what that big institutional objective is, it's hard to move the institution in any particular direction. It's ever so much harder now, because of all the legal entanglements and public policy entanglements that institutions like this have to deal with. So from a public policy standpoint, it's a much tougher world in which to solve the kinds of problems that the utility district has been confronted with over the years. If you were to try in the nineties to build what the utility district built in the twenties or the forties or the sixties, I don't think you could do it. What you would do in the nineties is to build something that would be a substantially different institution, if you could do it. It would be kind of like watching the efforts to build the new Bay Bridge. It's going to be a lot different than the effort to build the one that's there now.

Bert Carrington and Other Directors

LaBerge: Yes. You once mentioned one of the old board members, Mr. Carrington.

Maddow: Mr. Carrington was one of the really interesting people at East Bay, and I hope that Jack or Harold Raines talked about him.

LaBerge: No, they didn't, so I'd like you to.

Maddow: When I came on the board, there were two very elderly gentlemen on the board. Bert Carrington--his initials were A. C. Carrington, I don't know what A. or C. stood for, but everybody called him Bert. I think he served on the board for more than thirty years, and I don't think he started until he was past

sixty. When he left the board, I believe he was the oldest living elected official then serving in the United States. He was well into his nineties.

He had been, I think, the owner or perhaps the president of a chocolate company. I think it was called Saylor's [spells] Chocolate, which was an old Oakland firm. I don't think it exists any longer. I imagine he was probably appointed to the board--that's the way it worked back in the old, old days, sort of the business people would appoint people they knew.

He was an interesting man, because when I first met him in 1972, he was almost totally blind. His wife, as I understood it, would read the materials to him that were sent to him by the district. He would come to board meetings, and he wouldn't always have a great deal to say, but when he said something, he was obviously dealing from insightful knowledge and from sort of a business person's sense of things. Even though he was blind, he was very sharp. There was someone from the district staff who would go and pick him up and bring him to the meetings, and make sure he got home safely. After Mrs. Carrington became ill and eventually passed away, I think a district person would actually do some of the reading to him so that he could continue to function. I think he was on the board until he was ninety-four, something like that.

Now, Howard Robinson was an insurance executive. He served a similarly long period of time, something on the order of thirty years. He didn't speak out as much as Mr. Carrington did in the board meetings that I can remember attending, but I do recall one time, there was a contract that was coming before the board, and there was something odd about it. I frankly don't remember what it was. But there was a question about whether a contractor could be either allowed to walk away from its bid, or allowed to make a change for some reason midstream in the contract. Oh, I know what it was. It had to do with the purchase of chemicals that were used in the water treatment process. I think the particular chemical was lime. The refinement process that was used for the lime that was purchased by the district for use in

its treatment plants involved heat. I've forgotten just what year it was, but I think it was '73 when we had the first Arab oil embargo, and the price--

LaBerge: That sounds right.

Maddow: --and the price of oil shot upward. This contractor begged for relief from the firm, fixed price it had quoted, because it couldn't possibly stay in business at that price. I was asked whether there was a legal theory under which that could be accomplished. I remember doing a lot of research, and finding some theories, and putting something together that Jack was satisfied with, and finally, it came time for that matter to go before the board. It was being presented to the board, and I can't remember whether it was Jack who asked me to answer the questions or the staff person, I just don't recall that. But I had to stand up and offer these legal theories to the board.

Howard Robinson was a stickler for procedure, and for business people sticking by their word. We ended up with, as I recall, a four-to-one vote in favor of granting the relief that this contractor had sought, that the staff wanted to give, for which I'd found a legal theory that would work, and Howard Robinson would have none of it, and he voted no. I can remember people coming up to me afterwards and saying that's the first time that they could remember in all the years that Mr. Robinson had been on the board that there had been a split vote where he was the only one in the minority, and it was all on this matter of principle. And "Maddow, you've achieved something." And I can remember saying to somebody, "Yes, but I don't know if it's good or bad." [laughter] So that one kind of sticks out for me.

There was another man on the board then named Bob Nahas [spells], who is best known around here because of the Coliseum. He was the person who was the major thinker in terms of putting together the Oakland-Alameda County Coliseum. He was a developer, he developed the Orinda Woods complex, and he's done a number of other things like that, shopping centers and things like that. He's a fascinating man. Many, many years later, my

daughter won a scholarship called the Nahas Scholarship when she was graduating from high school and going off to college. I happened to have an opportunity to talk to him after that, and I reminded him that he was the person who made the motion, as I recall, that resulted in my being hired by East Bay MUD. It had to be a board appointment. Maybe he didn't make the motion, but he was the one who spoke up at the meeting. And I remember him looking out at me and saying, "Now, Mr. Maddow, I want you to make sure you keep us out of jail." And I said, "I'll try, Mr. Nahas," and that was it. Here I was, shaking in my boots, not knowing what was going on.

But Bob Nahas was another one of those big thinkers who East Bay MUD was fortunate to have on its board for a while. I can remember that there was a time when there was discussion about implementation of the district's American River water service contract, and it was clear that it was going to be a very long time before it would be built, the facilities to bring in the water would be built, and yet, the district had to start paying for the water under what's called a "take or pay" contract. Somebody, one of the environmental organizations, got up and started talking about that, and Bob Nahas said, "If we didn't take this water until," and then he said some date, I don't remember what it was, "how much would we have paid out prior to the time we started taking any water?" And the staff had done the analysis, and it was millions and millions of dollars. And he said, "That is absolutely dirt cheap, given the insurance that that the contract will provide."

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Maddow: [Bob Nahas] was willing to think about what was going to happen twenty or thirty years down the road, and I think that that was a valuable type of thinking. He was the big thinker type guy who used to be on boards like this, and I think that that was real important.

I've spent a lot of time on that, Germaine; I think it's time for you to give me another question.

Affirmative Action

LaBerge: Okay. Well, just talking about Ken Simmons brought up just the issue of affirmative action. One of the dates I have is '75, voluntary affirmative action?

Maddow: Yes.

LaBerge: Do you remember how that came about, and was that before Ken Simmons was on the board?

Maddow: I believe it was before Ken came on the board. If I am not mistaken, Ken came on the board in '76 or in '78. I think it was '78. I should remember that.

LaBerge: We can check that date.

Maddow: The district had already moved in the direction of a voluntary affirmative action program--and this was in regard to employment --establishing employment objectives in terms of what I guess we would now call--well, I guess even then it was an affirmative action principle. But the district began to look at the distribution of women and people from ethnic minorities throughout the workforce, and concerns about that issue were obviously going to exist in a community in the East Bay in the sixties and seventies. They began to be recognized. The district had a human resources department that was pretty good, and I think this was happening to some degree spontaneously and to some degree because there were workers within the workforce who were concerned. There were broader political pressures in regard to these kinds of issues.

LaBerge: Well, I know it was out in the world.

Maddow: Absolutely.

LaBerge: For instance, Bank of America was picketed, and a couple of other large companies, so--

Maddow: I can't really put my finger on the genesis of it at East Bay, but I can tell you that these efforts had begun prior to the time that Ken Simmons came on the board. Ken was sort of the principal ramrod of not only making these efforts but increasing them, stiffening them, and expanding into other areas. For example, Ken more than anyone else was responsible for the affirmative action efforts of the utility district in regard to contracts for materials and supplies and services. The utility district early on, in relationship to lots and lots of other agencies, was very active in those areas, and has been able to--I think has had a remarkable track record in terms of bringing minority and women-owned businesses, disadvantaged businesses, into sort of the mainstream of the district's work.

And it's happened in a lot of ways. I remember during the time that the risk manager reported to me while I was general counsel, he went out on his own and in effect developed a minority insurance brokerage firm. What he did, he found a commercial lines insurance firm in the East Bay that was owned by a black family. Actually, my recollection is it was a man and his brother and the daughter of one of those men. They did commercial lines insurance for small businesses, but they had never done anything on the scale of the kind of insurance that East Bay MUD buys, which is pretty sophisticated stuff. And the fellow who was the risk manager then and is now, Tom Nordin [spells], he knew that a firm like that couldn't take the place of the big commercial lines insurance brokers the district was using.

But what he did was to get this firm moving in a direction where they kind of educated themselves, and came in as a subcontractor sort of, almost like on-the-job training, working with the big firm. Tom worked at carving out certain of the tasks that had to be accomplished by the broker, and sort of earmarking them for the minority subcontractor at the beginning, and later joint venturer, if you will.

That was the kind of thing that a lot of people at East Bay worked hard at, because they knew the institution had this

commitment, and they knew that their own success as a district manager depended upon their meeting the district's objectives, standing up for the district's commitments, et cetera. And we had real good people who, regardless of whether--I don't know this, but it wouldn't surprise me to find out that some of the people were doing this against their own personal views or values. But they were committed to it, because the institution not only made it the institutional objective, but it looked at its individual employees and said, "We're going to gauge your performance on how well you measure up to those institutional goals and objectives."

You find that in the private sector a lot more than you do in the public sector, and that was one of the things that happened at East Bay in the whole area of affirmative action, both in the workforce and for contractors. It was with Ken Simmons being the ramrod. I give him a lot of credit for that, because sometimes, he too was out there all by his lonesome, and he's a very bright guy and has been a very valuable director in a lot of ways, even though there are those who will be critical of him because he wasn't always there. He wasn't always as committed. There were many times when he would sit out the debate, and he wouldn't go to meetings and things like that. Because he's a busy guy, pulled in a lot of directions. But when he was there, boy, was he effective.

LaBerge: Well, who else was involved, though? Because if in fact the district really had this policy, a lot of you must have been behind it.

Maddow: Yes. Frank Howard was very much involved from the legal perspective and did a lot of good work. Frank really believed in this stuff. Frank's wife was an attorney who had not had the easiest time practicing her profession, because there weren't very many women attorneys around in those days, and Frank recognized that. I think that had a bearing on his thinking.

There was a man named Jay Smiley, who was the head of the personnel department for much of that time. He had a man who

worked for him who's dead now named Norm Schwab [spells]. They really believed in these things. The district hired a woman named Jean Love Smith to be its affirmative action officer I think around '75 or '76. I took my hat off to her when I first met her, and I continued to for the whole time she worked for the district, because she was the one who had to go out there to the East Bay MUD field forces where you had construction people who had always done it their way, and she said, "When you're making a hiring decision, you're supposed to, all things being equal, take the person who looks like people who you've never taken before."

We didn't have quotas, we didn't have the things you couldn't have. What we had were programs that were built on jawboning and establishment of objectives and doing our darnedest, and that's the hardest kind of program to run. And Jean Love Smith was the person who really fought the hard fight. She was the district's affirmative action officer; she was sort of ombudsperson for people who had a problem, be it because they were black and weren't getting consideration they thought they should, or female, or whatever it was. She got right down in the trenches and fought some of the real hard, lonely fights. In her quiet way, she was a very gracious person and a quiet person, but who could shout when she needed to. She really is owed a great deal of credit.

I also think, though, that you have to give a lot of credit to the people who were at the top of the organization, because it goes back to Jack Harnett and it went through Jerry Gilbert, and I think every other person I know who has occupied that chair.

I don't know what any of those people thought about in their personal beliefs about equality in the workforce and nontraditional employment and all those kinds of things. But they were willing to put themselves on the line for those issues, because it had become what East Bay MUD did.

Settling a Lawsuit

Maddow: During my tenure as general counsel, we fought the hardest fight about all that stuff, I think. There was a case that actually began before I became general counsel, but it matured while I was there. There were two black employees, a man named Frank Erving [spells] and Stan McIntosh. They had brought a lawsuit against the district alleging that they had been discriminated against on the basis of race in regard to job opportunities. They were in the workforce, and they alleged that they were still at the lower reaches of the workforce, in spite of the fact that they were as qualified, or they even alleged that they perhaps were better qualified than others. And they in effect alleged, I guess I would call it, institutionalized discriminatory practices.

The case didn't look like much at the beginning, because it wasn't very actively litigated. But then it took on significant proportions later on. They hired an attorney named Todd Withy [spells], who was sort of a classic civil rights attorney. He was a big, tall, angular guy who I think had grown up in Berkeley, and who always had a smile on his face, and by golly, he was going to change things. And he did, he was very effective in his way.

They were able to show on a statistical basis that there was enough of a track record to allow an inference to be drawn that in fact, there could have been discriminatory practices or policies or procedures or something. They didn't prove it. It would have been difficult to disprove. It was very intricate and very hard stuff.

What we ended up doing, when we realized where we were in that case, was to say, "We think we could win at trial, but it will be ugly, and it will be divisive. We could lose at trial, and that might be even uglier and more divisive. That's sort of a Hobson's choice, and maybe the better thing to do is to find a way to resolve this case without getting to that endpoint that says, Yes, by golly, there was fire indicated by that little bit

of smoke, or No, by golly, it was a puff of smoke and there was no fire." I'm still convinced that if you had--you see, East Bay MUD is a pretty big organization, but it's not anything like the state government or the federal government or something. And so you can find that there will be one or two incidents that might, from a statistical standpoint, end up taking on enormous significance. And we had some of that.

The main statistical results looked pretty good, but there were some things on the edges that looked not so good, aberrational or whatever, but it was out where we had the onesies and twosies. We had special counsel on that case, a firm called Carroll, Burdick, and McDonough [spells]. Our lead counsel was a woman named Betsy Leavy [spells], and occasionally a man named Chris Burdick, who was one of the main partners, came in. We had the task of going back to our client--the board of directors, management--and showing that, no matter how this case proceeded, it was going to be potentially inflammatory and extremely divisive for a workforce that didn't need division at that point, it needed healing. If there was anything that needed to be healed, we needed to heal it. We didn't need to make it worse. We didn't think things were all that bad.

And so we did settle the case, and the district paid out--I've forgotten the numbers--I think it was around $800,000. By this time we had set it up as a class of district employees who were primarily in the blue-collar workforce. We had a settlement fund administered by a trustee. We also paid out hundreds of thousands of dollars in attorneys' fees to the plaintiffs, and we administered the case in the most professional way we could, and tried as best we could to not run from it but to say, Okay, we are not going to battle this out and leave anybody's blood on the courtroom steps. Because that's not healthy for an institution that is as small as East Bay--for any institution. And although it may seem a large one, it's a real small one when you're fighting with your own family, and that's kind of how it was viewed.

I give a lot of credit to the Jean Love Smiths and the Jerry Gilberts and the board of directors, frankly, for being able to sort of lead the district through that tough time. It was a very tough time, real hard stuff. Real hard stuff as a lawyer, real hard stuff as a manager, probably hardest stuff as a director. In the final analysis, I think the directors think that they were well served by the legal process, even though they didn't like having to pay out all that money to Todd Withy, but that's the way civil rights litigation works and they realized that.

Now, I suspect that if you were to go back to that workforce, and you were to go to today's Frank Ervings and Stan McIntoshes--they're both retired now--you would probably find that the things that were done that were affirmative steps that were put in, in addition to paying out money, there were all kinds of tests that we applied and tracking mechanisms we established and all that, and training programs and the full gamut of things you can do--I think you would find that the frequency and the severity of the complaints that are related to diversity of any sort has probably been significantly diminished, and I think it's in part because the utility district learned a great deal through that trying time.

I'm saying all that on the basis of having been gone three and a half years, so I may not know all of what I speak. I guess it's almost four years now I've been gone. But my sense is that it's a healthier workforce, healthier workplace as a result. That's not to say it's entirely healthy; I know they have other sets of problems, but I think that that one has been, or hopefully has been--it's never taken care of, but it is being attended to better.

LaBerge: So you were never in court on this. You were always--

Maddow: Oh, we were in court, but it was not in a full-blown trial. The judge was Lowell Jensen, who was formerly the district attorney of Alameda County and is on the federal bench. We spent a fair amount of time with him. A good deal of the work with regard to these statistical things was done by the magistrate, a man named

Wayne Brazil. We had significant amounts of activity. We had experts and statisticians and all those kinds of things that you do. So there was a lot of litigation activity, but it never went to trial; it was at that point, before we were going to get to the point where we had to go to trial, significantly before that, that we said, "There's a better way." It was a very difficult settlement to negotiate, but we made it work.

LaBerge: Did you initially start being the trial attorney for it and then hire--?

Maddow: No. At the time that I became general counsel, the case was already underway, and Frank Howard had been the lawyer in the office who knew more about it than anyone else. The legal work was primarily being done by outside counsel who were specialists in this type of law, and Betsy Leavy was the lead lawyer. Betsy was--I think very highly of her. I still consider her to be one of the best lawyers I've ever known. Betsy--some people took a dislike to her, because Betsy has a thick East Coast accent--Betsy is the kind of speaker who wouldn't need a microphone to address a political rally. She has a voice that can be loud and harsh and all that stuff. She is not a harsh person or a loud person, but for some people, she was a little off-putting when they first met her. That took some getting used to.

I loved working with Betsy, because by golly, she was direct, she was straightforward, she could cut right to the chase, and she was a real fine lawyer. And she had a number of younger people who worked with her who were also very good lawyers.

When I came to the office; the case was still a little on the quiet side. It heated up again after I had been in the office for a while. Frank was still there, but then Frank retired not too long after I had become general counsel, and I pretty much took the lead myself. That was in part because we were a small office at that time and it had to be done, and in part because I was aware of the sensitivity of it and I thought it demanded my attention.

LaBerge: Maybe I am beating this to the ground but I have one more question. Was it your responsibility or was it the human resources office in general?

Maddow: You mean the case?

LaBerge: No, not the case, but just affirmative action--

Maddow: Oh, it was human resources.

LaBerge: But they would come to you with questions or problems?

Maddow: Yes, yes. And for a very long time, the utility district had been looking at the legal aspects of the affirmative action and the whole range of employment law. Frank was pretty good in that area. After a while, we had another lawyer, Nancie Ryan, who went to work for the district in 1981. When she first came there, she was Nancie McGann, and she went to work there April 1, 1981. She's now I think the assistant general counsel. Nancie was pretty good in these areas, but we had these outside lawyers, the Carroll, Burdick, and McDonough firm as I say, and in particular Betsy. They'd worked with the district for a long time. The district had worked with a consultant named Dick Biddle [spells], whose work was highly regarded in these matters. Later some other analytical approaches for this kind of work came along, but for what he did at the time he did it, it was valuable work for the utility district, and the human resources people worked closely with him.

On the affirmative action in contracting side, that took a little different twist. That really got its start, I guess I would say, in the early eighties, when a woman named Artis Dawson [spells], she came to the district right after Jerry Gilbert became general manager. There was quite a dispute when Jerry

became general manager. The board was divided. There were some other candidates who were being considered and could not get four votes. Ken Simmons was the fourth vote, and had his own ideas.

Jerry was not a candidate at that time. He was in private business. But for some reason, right toward the end of the board's labors looking at some other candidates, Jerry knew one of the directors, I think, and there was some contact--I don't know who initiated it. Jerry became known to the board as a candidate. They knew Jerry; Jerry was quite well known in the water industry. Ken Simmons wasn't real pleased with that, and in fact, at one point in all of that, Ken actually filed a lawsuit against the district in regard to the manner in which the board of directors was going about employing its new general manager. And Jack Reilley probably talked about this.

LaBerge: No, he didn't.

Maddow: Well, it was an issue that I don't know all the details of. It's something that Jack would have been much closer to. But in effect, some of the things that Jerry Gilbert tried to do and did in the first period of his tenure as general manager were reflections of Ken Simmons' efforts to diversify the workforce at the top of the organization. And Jerry hired a series of, I think it was six people, in a capacity known as something like executive assistant to the general manager. And the idea was to bring in people who would be sort of new manager--embryonic managers, sort of. People who were from outside the organization or who were making a change in their career field within the organization or something like that, and hopefully would bring some diversity.

Artis was one of those people. She had previously been, I believe, the executive director of the Alameda County--hmm. It was not the parole board, but it was, I think, something like the Criminal Justice Advisory Board.

But she worked with Lowell Jensen, who was D.A. at the time, and she was the person who--she was like thirty years old. And

Jerry brought her in, and one of the things he had her do initially was to work in the operations and maintenance department working directly for or with the department manager to deal with labor negotiations issues, because that's where most of the workers were and that's where most of the workforce issues came up. So Artis observed the labor negotiations in 1982 and all that. Not too long after that, she ended up being appointed to a position in the human resources department where she had responsibility, among other things, for some aspects of the affirmative action program.

Minority and Women-Owned Business Enterprise Office

Maddow: Eventually--not eventually, but almost right away, I guess--she was also given the responsibility for the minority- and women-owned business enterprise program, the other half of affirmative action. And Artis still has that responsibility today, as I understand it. I don't exactly know the position she occupies now. She's a department manager. But under her prodding, pushing, whatever--she was the one who implemented the Ken Simmons policies, the things that he had ramrodded. She has had a number of people who have worked for her in that capacity, and one in particular is a woman named Audrey [Rice] Oliver, who is now quite well known as a consultant. As a matter of fact, if you read the business section of yesterday's San Francisco Examiner--actually, there's a section called "The Bay Today" or something--

LaBerge: Yes, it's a new special section.

Maddow: There's a write-up about three women, successful business entrepreneurs et cetera, and executives in the Bay Area. Audrey is one of them, and for a while, she was East Bay's minority and women business enterprise coordinator, working directly for Artis. Audrey has close contacts with the Clinton

administration, and she is reputed to be a candidate for mayor of Oakland.

LaBerge: I went to one of their community meetings, and I was very impressed. They have three or four a year, with statistics and everything, it was very impressive.

Maddow: Oh, yes. It's run now by a woman named Beverly Johnson who first worked at the district as an engineering aide. I remember working with her when she came there and was carrying drawings around, and lo and behold, she got so interested, she went back to school and got a degree. I don't remember the stories that led to her ending up as the MBE coordinator, but she's a real favorite of mine. I knew her when she was probably twenty years old working in the engineering department.

But people like that have fought long, hard fights. And you've got to give them credit. And the institution is better for it. I really like working with those kinds of effective people, and they were--as I say, most of the time, those functions were run through the human resources department. After a while, Artis moved over to run the district's public affairs department, and in that capacity, she took minority- and women-owned business with her. But affirmative action having to do with the workforce stayed back in human resources.

LaBerge: We're almost out of tape, so should we end there?

Maddow: Let's end here.

District's Response to Drought of 1976-1977

[Interview 3: March 7, 1997] ##

Middle River Pumping Plant

LaBerge: We're going to talk a little bit about how the district responds to shortages.

Maddow: I thought we might talk about a couple of aspects of what happened first in the seventies and then a little bit in the eighties. Until the drought period in 1976 and '77, the utility district had never really faced a significant problem with shortage of water, but the combination of very dry years, '76 and '77, resulted in very serious problems for the utility district and for many other utilities, many other water suppliers, and resulted in some interesting things, both from a legal perspective and from an institutional perspective. I thought I'd touch on the water supply end of the equation and then a little on the customer end of the equation.

LaBerge: Good.

Maddow: On the supply end, the utility district was facing unprecedented shortage of supplies. Up until the time of the '76-'77 period, the utility district thought it had a greater safe yield from its project than it now knows that it does, because '76 and '77 did happen. I don't remember all the technical details or the numbers, but suffice it to say that after 1976, the utility district entered 1977 in a somewhat more precarious position from a water supply reserve standpoint than it had done in the past, and of course, '77 was an even worse year. So the district had to look at a variety of arrangements to try and cope with that shortage. It looked at all kinds of things, including, for example, figuring out a way to take water out of Camanche Reservoir, which isn't connected to the domestic water system, and get it down to the East Bay.

Eventually, instead of doing that, one of the things that the district did was to build a pumping plant out in the Delta on an island called Woodward Island. The pumping plant was adjacent to the intersection of Woodward Island levees and the district's aqueduct. The purpose for that pump station was to let the district take water directly out of the Old River--actually, it was out of the Middle River. Woodward Island has Old River on one side and Middle River on the other side.

LaBerge: Old River being the name of the river, not--?

Maddow: Old River is the name of the river, and Middle River is the river on the other side of the island. The district was on the Middle River side of the island, because there was a little easier access there for construction purposes. The district built this pump station, which pumped water which was made available to the district under its federal water supply contract. The federal contract was written to provide for the district to get water out of the Folsom South Canal, but in the drought period, the district negotiated an emergency change in the contract terms, and the federal government and the State Water Resources Control Board allowed the district to take some of the water under its federal contract at Middle River.

LaBerge: And this is the federal contract for the American River water?

Maddow: That's correct. It's a contract that had been signed in 1970, and that contract has a specific point of delivery along the Folsom South Canal up near Grant Line Road in southern Sacramento County. What was done in the drought period was that the district and the bureau agreed upon an emergency change in the point of delivery of that water, and the State Water Resources Control Board consented to allowing the water to be in essence rediverted, federal water to be rediverted in the Delta at a new point of rediversion. That's a water rights term of art.

And so the district quickly built this remarkable pumping plant and pumped Delta water into the district's #2 aqueduct, which was in essence valved out of service--you could no longer

get water from the Mokelumne, from Pardee into East Bay via that aqueduct.

Contra Costa County Supply

Maddow: But at the same time the district was doing that, it was participating in a variety of other arrangements involving other utilities to try and move water in this drought circumstance. And two of them I have always thought were very interesting from the standpoint of both institutional arrangements and legal considerations for moving California water around to meet needs.

As you know, the district has three barrels to its Mokelumne aqueduct, and the Middle River pump station was built to pump Delta water for the district at Middle River via this special pumping plant. On the other side of the aqueduct right of way, a second pumping plant was built. And this one took water out of Middle River, pumped it into the utility district's #1 aqueduct, and moved it just a few miles through--across Woodward Island, and then across the island just west of there, which I think is called Roberts Island, something like that, and deposited the water in what was called Indian Slough. Indian Slough is hydraulically connected with Rock Slough, which is the point at which the Contra Costa Canal takes water for the Contra Costa Water District, which serves about 400,000 people in central and eastern Contra Costa County--sort of the other half of the county that East Bay MUD doesn't serve.

Now, Contra Costa has a federal water supply contract, and in effect, could still get plenty of water through its contract. It's just that because of the dry period we were in, the quality of the water in the western Delta was quite degraded, the salt content was very high. And, from a legal perspective, Contra Costa was able to exercise some rights that it had against the state, regarding salinity control. The federal government built its project, the Central Valley Project, which included the

Contra Costa Canal, prior to the time the state came along and built the State Water Project. State rights are junior to the federal rights, et cetera.

Contra Costa had always asserted that it had a right to higher quality water for drinking water purposes than the feds were prepared to deliver, but the state had this junior water rights priority. And so Contra Costa had many years before been able to negotiate to a point, or litigate to a point, where the state in essence had to make a commitment to guarantee the quality of the water at the intake to the Contra Costa Canal. And so at the same time the utility district was building the Middle River pump station for its own water supply, the state came along and built a pump station on the other side of the right of way to use the district's #1 aqueduct to move water from Middle River--I think it was about eight miles west in the Delta--to deposit it in Indian Slough to sweeten the quality of the water there so that Rock Slough would not be sucking salt water and the people of Contra Costa County served by CCWD would still be able to use their water supply.

So there were two relatively unique arrangements that were made virtually simultaneously, and in a couple of days. I mean, the arrangements were worked out in just a few days. The construction cycles were very short, but in particular the institutional arrangements took just a very brief period of time.

Marin County and the Great Circle Route

Maddow: But the most surprising part of all was that at the same time, there was what I call the "great circle route" that also was going on. The entity in the Bay Area that was in the worst shape from a water supply standpoint at that point was the Marin Municipal Water District. They take their water supply from the rainfall that falls on the slopes of Mt. Tamalpais, and of course, during that cycle, there wasn't much of that, and they

were really up against it. The great circle route was just a really remarkable arrangement that got worked out in a very short period of time with some very simple agreements.

The Metropolitan Water District of Southern California recognized what was going on, and they agreed to forego deliveries of some of the water to which they were entitled from the State Water Project. The state then pumped some of that water that was contractually bound for Metropolitan, they pumped it out of the Delta via the Delta pumps, the regular State Project pumps, and pumped it into what's called the South Bay Aqueduct.

Now, in order to get the water from the Delta to Marin County, it was going to take some remarkable arrangements. There are no hydraulic connections to any of those places. They had to fashion a very special connection between the South Bay Aqueduct and the water supply system of the City and County of San Francisco, which is the wholesaler of water to the City of Hayward. San Francisco managed to find a way to get the water that they got out of the South Bay Aqueduct to the City of Hayward. The City of Hayward abuts the service area of East Bay MUD, and so there are some pipe connections that were made between the Hayward system and the southern end of the East Bay MUD system.

At the northern end of the East Bay MUD system, a pipe was thrown across the Richmond-San Rafael Bridge, the Richardson Bay Bridge. In essence, one lane of that bridge was sort of sacrificed to become a pipeline, and it looked like--it was what people used to call invasion pipe, I think. As I recall, it was just steel pipe, unlined, uncoated. East Bay MUD built a pump station quickly near the base of the bridge.

So the great circle theoretically involved Metropolitan giving up some water, the state pumping that water to San Francisco, San Francisco moving it to Hayward, Hayward moving it to East Bay, and East Bay moving it through its system to Marin County.

Now, if you were to try and sketch out that arrangement and then do all the contractual ramifications of it, et cetera, you would take months. But this deal was done in about a day, and it was--I wrote a couple of drafts of what ultimately became the contract. My recollection is that it took just a very few pages. I think the arrangements that allowed Contra Costa to benefit from East Bay's #1 aqueduct, I think that was a three-page agreement. And it seems to me that the one involving the great circle route was about six or eight pages, something like that. And I used to jokingly say that we worked all these things out on the two sides of one envelope.

But the thing that amazed me was that in these tough times, entities which had not always gotten along all that well made these things work, and I think we did it all legally, and I think we did it all appropriately. I don't think that there's anybody who ever felt that they had taken a terrible financial beating or anything like that as a result of it. The people of Marin County voted to pay their share of the construction costs, et cetera, out of their current revenues. They did not go into debt to do it; they took an enormous economic burden on in a short period of time, because there was a lot of construction that was involved. But all in all, these systems worked.

Now, I don't think you could ever find a molecule of water that went from the Delta around through San Francisco and East Bay and all that to Marin. What basically happened was the people of Marin County were getting water out of East Bay MUD's San Pablo Reservoir, I imagine. But for every drop of water East Bay sent to Marin, it got that much water in return, and most of the water that it was getting was basically San Francisco water. So from a water quality perspective, it really did not make an adverse impact on East Bay, which has always prided itself on its pristine water supply.

However, pumping that American River water out of the Delta at that Middle River pump station did have an adverse impact on East Bay's water quality, because that water was dramatically different in quality from what East Bay had in storage, and from

the water it was still getting out of the Mokelumne via its #3 aqueduct. So my recollection is that operationally, the utility district decided to put all of that water, all of their Delta water, into San Pablo Reservoir, rather than spread it throughout the system. And someone would have to check this, but I believe that that's the way it worked operationally.

Getting that lower quality water through the East Bay MUD system presented a bit of a problem, because the utility district's treatment works are not set up to cope with that lower quality Delta water. But as it turned out, in what perhaps was a lucky coincidence, or perhaps it was great planning, I'm not sure which, shortly after this drought cycle ended, East Bay had to rebuild San Pablo Dam. After the 1971 earthquake down in Los Angeles, the state Division of Safety of Dams required a new form of dynamic analysis of earth-filled dams like San Pablo, which is a very old dam. San Pablo needed to be rebuilt for seismic safety purposes. After a lot of engineering work, it was determined that the only way to rebuild it was to take it out of service. And so in effect, San Pablo Reservoir was drained shortly after the drought period, and I suspect that much of that lower quality water eventually just got dumped to the sea, as San Pablo Reservoir was being taken out of service for that reconstruction job.

Again, there are facts there that I'm probably forgetting or oversimplifying, but I've always been kind of fascinated by the fact that we overcame a lot of legal hurdles and obstacles, a lot of institutional biases, a lot of regulatory proceedings, and did a whole lot of stuff in a big hurry on the supply end to try and share the water that was available. I have never seen anything quite like it since. It took a lot of doing and was a lot of fun.

From a legal perspective, I don't think we broke any great new ground there. We did a lot of things by virtue of very simple, very straightforward contracts. But I think what we demonstrated was that, when the parties are willing, and when there is an obvious need, that water can be transferred very

efficiently and effectively to meet crying needs. Of course, the trend that we're moving to in California water law, and western water law, is that transfers of water need to be facilitated. It's one of the points of the Central Valley Project Improvement Act, it's one of the points of efforts to develop and improve the water transfer legislative system, et cetera. I would say that to some degree, at least my thinking, and I think the utility district's thinking, about what can be done with regard to transfers helped to get shaped in that period.

Customer Usage during the Shortage

Maddow: Let me switch for a moment now to the--I call it the customer side of the equation. East Bay didn't have enough water to go around, and needed to do something about it. There weren't a whole lot of models for how to do this. We in effect needed a way to ration water, which was the term that we used internally, although it was not a term that the district wanted to use in its publicity or anything like that. It was not intended to be--it wasn't supposed to have the feel of a mandatory imposition by the government. Part of the reason for that was the utility district did not have police power, and therefore it could not really impose a real rationing program.

Instead, the choice that was made was to do what probably was the only thing the utility district could have done to try and get its customers to reduce water. That was to do as much as you could to educate your customers about the nature of the problem, and then to deal with rationing through a pricing mechanism, and let the fare box, the marketplace, do some of the control.

That's a difficult thing to do. It hadn't been done before by this utility. It had been done by Marin Municipal, and I found myself sort of going to school on the experiences and the ordinances and programs written by the man who was then the

lawyer for Marin Municipal, a man named Tom Thorner. Tom had helped develop some pricing structures for Marin, which of course was receiving the effects of water shortage, of no precipitation, a year faster than everybody else, because they didn't have the kind of storage that people like East Bay did.

Will Rationing Work?

Maddow: So we looked at the kinds of things that Tom had done. In a nutshell, the utility district management and board gave the task of developing a rationing program that would work to the man who was at that time the director of engineering of the district. His name was Walt Anton [spells]. He's dead now. And to the district's data processing person, a man named Larry Qvistgaard [spells]--I think that's right--and to the district's customer services manager, a man named Bob Eaneman [spells], an Old Blue.

LaBerge: I've heard his name.

Maddow: Yes, he's been around here forever, and was very active in Berkeley service clubs and things like that.

But our task was to come up with a program that would work across the board for the district's customers. It was all premised upon the idea that there would be across-the-board percentage cutbacks for all customers in an effort to achieve an overall 25 percent reduction in the consumption of water by the district's customers.

LaBerge: When you say "our task," was the legal department part of this group?

Maddow: Yes. I was the fourth person, and I was the one who was always the scrivener, and I found myself sometimes having to be the one who would either be the architect or the gatekeeper. I would sometimes find myself saying, "You've gone beyond where I think

the law will let you go," and it was that kind of an interactive thing.

The four of us worked well together. We didn't always agree on things, but we worked well together. We worked hard, and worked some long hours.

LaBerge: What were the legal issues?

Maddow: The legal issues had to do with what you could do in the absence of the police power, what could you do from a rate-making standpoint to try and cause customers to reduce their consumption in a manner which would afford them due process and which would observe the constitutional provisions regarding equal protection. And it was equal protection that became the big issue when we first came up with the program.

The board of directors had thought, and the management of the utility district had thought, that the way to do this was simply to start imposing across-the-board, uniform cutbacks for everyone. And so the first theory was, do it on a percentage basis. Look at the single-family, residential customers, and the multifamily, apartment customers, and commercial, and industrial, and just cut them all back. And you might have different percentage cuts between classes, but give everybody in each class the same kind of cutback. So that was the proposal that the staff made.

One of the critical legal issues was that the utility district has a statutory notice provision with regard to how it makes rates. It can only make rates after the general manager gives the board a report and recommendation on what the new rate structure should be. Then there is a provision that requires a public hearing, and there are some time limits on when the public hearing can be held and when the board can act.

So we went through all the notice stuff, and put out this program, and went to the public hearing. I'd have to go back and check the records, but I think the public hearing--I think this

was one that was held in the auditorium at the Kaiser Center in Oakland. I think that's right. In any event, we got a roomful of people who came in and said, "Wait a minute. I have been conserving water at my home for a long time. I have been redoubling my efforts during the drought of 1976, and here you are coming along in 1977 and telling me I'm going to get a percentage cutback? That's not fair. You're denying me my rights. I'm not being equally protected. All of my good works in the past will have gone for naught, because now I have to cut back from an already degraded base," and all that.

Well, the board of directors decided that that percentage cutback plan wasn't going to work, and so they directed the staff to come up with an alternative. As I recall, that hearing was on a Tuesday. And it went until quite late in the evening, which was rare for the utility district, which normally has its board meetings in the afternoon, but never in the evening. That one was in the evening.

Developing Usage Allotment

Maddow: So the team of us went back to the drawing boards, but it was primarily Mr. Anton who went home, and I am convinced he stayed up all night working on this, because he came to work in the same suit the next day. I'm also convinced that, although he changed his suit the next day, that when he came to work on Thursday, he had not been to sleep yet. He developed a rationing program which he first had to sell to me and convince me that we could make it work from the standpoint of due process under the law and equal protection.

Basically, it was a system that provided for establishing an allotment for each single-family residential customer. And the way we established the allotment was to find data which allowed us to determine in essence how much the typical single-family residential consumer would use for inside-the-house usage, and

establish an allotment based on basically what we called health and safety needs that reflected those inside-the-house usages. And then, everything over and above that allotment, we suggested that the board should determine was in the nature of outside use or more discretionary use, not health and safety related. So we wrote some measures that said basically, if you use water within your basic allotment, the price really won't change--at least not as much--but if you use water above your allotment and get into those discretionary areas, the further you go into the discretionary use area, the more expensive it's going to be. So we adopted what was called a tiered rate schedule, and it was the first time the utility district had ever done it.

The theory of our tiered structure was that we would be still trying to achieve the same 25 percent reduction in water use. The board of directors was to meet the following week. The staff spent literally three straight days without a break trying to fit this together, trying to make it work, convincing top management to let us take it to the board. The board scheduled committee meetings for that weekend--I think it had a finance committee and an engineering committee meeting, and the staff made presentations to both committees so that the committees at least had a sense of what was going on prior to the continuation of the public hearing, which had been carried over from the previous week. And we went back out the next Tuesday afternoon, I think, and the board adopted this rate structure.

Now, from a legal perspective, I was fairly comfortable with it, because I thought it had a rational basis, that it was an appropriate legislative action by the board--that's what the board is doing when it adopts rates, exercising its legislative function--and I thought that we had a defensible nexus between the objective--water consumption reduction--and the mechanism that we were using. I frankly thought that we'd covered our due process bases and our equal protection bases through the way in which we'd arrived at it and I thought the allotment system would pass equal protection muster.

What we didn't do, and frankly, we got trapped by the legal requirements with regard to notice, we didn't reckon on the drought getting deeper than it was when we started. Because when we started and when the general manager made his initial recommendation, we were focusing on a 25 percent consumption reduction goal. When we finished, the snow surveys for on into 1977 had come in, and there was less water than we had hoped, and as a result, the district adopted a 35 percent consumption reduction goal. And in fact, the consumption reduction that was achieved by district customers was 38 or 39 percent below what would have been anticipated in a normal year for that period.

But the rate structure was calculated on recovering the revenues that you--staying revenue-neutral. In other words, if you start from the premise that a utility is basically a fixed-cost enterprise, you've still got to recover those fixed costs, plus the extraordinary costs of the drought, through the fare box, and if you're trying to get a 25 percent reduction in consumption, that translates to needing a 33 percent revenue increase just to stay even, if you just think about it for a minute--

LaBerge: Right.

Maddow: And so that's how the rate structure had been conceived. But then, that 25 percent consumption reduction goal increased to 35 percent, but we had already gone so far into the rate process that the board couldn't back out, in essence. So the rate structure that was adopted was aimed at a 25 percent revenue-neutral program, and in fact, the district lost a lot of money. It really ate up its financial reserves during that period of time, because the rate structure was not consistent with the ultimate consumption reduction goal or with what actually happened.

Recovering from that revenue drain was a tough issue for the utility district after it came out of the drought, because you'll remember that at about the same time, Proposition 13 was being passed. We were in a period of sort of taxpayer and rate-payer

revolt. And so the utility district went through some very difficult economic times after that that were kind of triggered by our getting trapped by the notice provisions of the Municipal Utility District Act [1921][1] in terms of this revenue program.

But the program worked. The main reason it worked, I am convinced, is not the fare box measure, but it was public education and public understanding of what was going on. The ethic of conservation took hold, and I think it's still evidenced in the utility district. The principle of tiered rates as a consumption management tool became established at the utility district. It was used again in the 1980s, and now it's become part of their permanent, nondrought rate structure. It's very controversial, as I think you probably know with this sort of east- and west-of-hills divide--

LaBerge: Yes.

East vs. West Argument with Examples

Maddow: And that relates back to what I said in an earlier interview about how the utility district is now much more subject to ward-versus-ward debates, and this tiered-rate structure debate is the principal subject over which that takes place. And the reason for it is that, in establishing the allotments or the basis for--

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Maddow: --the more you use, the more you pay type structure. Where are the knuckles in that rate curve going to occur? And that gets into a big debate about larger lots versus smaller lots, and warmer climates versus [colder] and all of that. And that has become very much an east-west thing that the utility district is still dealing with, and has had litigation over, and now there

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[1]California Public Utilities Code, Section 11500 et seq.

are legislation efforts, et cetera. But in many respects, it's sort of rooted back in the '77 drought management rate structure that we put together.

LaBerge: Did you get those objections at the public hearing too?

Maddow: In the seventies, we got some of those objections. One of the people who was one of the loudest objectors was a gentleman named Dean Lesher, who was a newspaper publisher out east of the hills. Mr. Lesher had a very large property, and it was lushly landscaped. He was bitterly angry at the fact that he could conceivably lose some of his landscaping or what have you.

The district was aware that there would be cases like that, and so we built in a variety of what I used to call safety valves, which would allow people to appeal for an exception, so that they could get a larger allotment. For example, more people in the house would mean more showers, more toilet flushing, et cetera, and therefore, you could get a larger allotment for that. But you could also in some circumstances get a larger allotment if, for example, you had permanent crops or some such thing that might be affected. I don't remember that that was one, but something like that.

Thousands of people requested exceptions, and Bob Eaneman put an extra desk in his own office where Gloria McKnight helped him process all of the extraordinary paperwork. I think Bob also ended up with blood pressure problems--he told me that he bought his own blood pressure monitor during this hectic period.

And Mr. Lesher wanted exceptions for his ornamental trees and things like that. So there were some pretty heated arguments about those issues. But remarkably, there was virtually no litigation. I think Bob Eaneman had a couple of small claims court actions, but we never had a superior court or muni court case. I think Eaneman's cases were collections-type cases, or someone attempting to recover something in small claims court for some minor damage or something like that. But we literally had no litigation over that rate structure in the seventies, which I

always thought was quite remarkable, because it was so new and it was such a dramatic change from the past. I like to think it was because, at least to some degree, the staff work and the legal work was good work. I can tell you that it must have been okay, because I think it still serves as the model for the way people do it in lots of places.

But that was the history of it in the seventies. There are a lot more details that get kind of interesting, but--

LaBerge: Well, do you have some anecdotes? Like, whatever happened with Mr. Lesher?

Maddow: He made a lot of noise. At one point, someone told me that he was buying water by the truckload someplace. I don't believe that he ever actually threatened a lawsuit, but I guess it was thought that he was the kind of person who might well sue over those kinds of issues. Mr. Lesher was a sort of a crusty gentleman. I met him a couple of times, and I found him to be really fascinating, because I think in his own way, he was brilliant. There were some parts of his thinking that I think may have been a little misdirected, from my point of view, but more than anything, it was a loud fight, and one which featured him getting in his own newspaper and that sort of thing.

I don't remember any other great anecdotes right off the top of my head. I'll have to think about that a little bit.

We did, during that period of time, have a really unfortunate incident--shortly thereafter, I guess. We had a couple of cases where the newspapers and the electronic media were looking for examples of people who were using so much water that they were going to be either shut off, or have what was called a flow restrictor placed in their meter. If someone was using too much water and continued to do so, the district was loathe to start cutting people off, because it didn't have police power, but it did have a policy, which we wrote into the regulations, which said that if you use way too much water and you continue to do it and don't abide by the allotment program,

we're going to put a flow restrictor which will allow you to get enough water for health and safety purposes but no more.

And there was an unfortunate incident in which the first time a flow restrictor was going to be installed, and the press wanted to go along, of course, it turned out that the person was a person who was somewhat unbalanced, and it was a very sad case. I was really pleased to see that the press chose to not report it. It was a difficult case, social service agencies became involved later, et cetera.

It was not too long after that that the utility district, shortly after the drought, had to deal with the case of the famous Richmond water lady, who thought she was washing away the sins of the world by running water from every tap that she could all the time, and saturating her home, water running on the roof and all over the property, et cetera. She was an elderly person who had been a schoolteacher, as a matter of fact, and I think that in her later years was just a little unbalanced or disturbed. That was a case where the police became involved, and the courts, and that sort of thing, and flow restrictors were installed, and an effort was made to try and control it, basically with the assistance of county mental health authorities, et cetera. But it was tied back to whether or not water was going to be available, and so I guess that's an unfortunate anecdote.

I do remember one other anecdote about the whole business about the construction, and I can't verify this, I can just tell you the story. When the pipe was being put across the Richmond Bridge, it was--as I say, it was just lengths of steel pipe. Right in the middle of the construction project, in the wee hours of the morning, a man was in a truck, and he was going to go duck-hunting, and I guess he fell asleep as he was driving across the bridge. His car veered to the right and struck a stack of this pipe. The way the story has been told to me by two different people, one of these lengths of pipe came right through the windshield of his car, through the rear window of the car, and out the back part of the camper shell. When his car stopped,

it was there with this big piece of pipe, with him on one side of the car and his dog on the other side, and neither one of them with a scratch on them. I always thought to myself, Somebody's going to get sued over this, but I don't think anybody ever was, so we got very fortunate in that one, I guess.

Public Hearing on Rates and Board Support

LaBerge: Well, when they had the public hearing, were you one of the persons up there answering the questions?

Maddow: Yes. And it was a situation in which Jack Reilley, of course, was still the general counsel at that time, but I had done most of the work. For at least one of the hearings, the big hearing on the rates, I know I was sort of directly in the line of fire. And the lawyer's role was to explain and to answer questions and that sort of thing. The board took most of the heat, and it was hard. It was something they had not been subjected to before, and they didn't like it. But I thought that they actually did a pretty good job.

And when they came out of that hearing and when it was time to give the staff direction, my recollection is that the board went at it in a very professional way. They could very easily at that point have run for cover or looked for political ground to protect or that sort of thing, but they were looking at what it was going to take for the utility to get through this grave crisis. And I have to say that I thought it was handled--I thought it was sort of one of those shining hours for that board. There were occasional outbursts or flashes of anger or emotion from directors, but that is to be expected from elected officials at tough times.

They were aware of this problem with revenues. They were aware that the utility district was facing economic problems down the line, but they were not about to exacerbate a difficult

situation by ratcheting up that revenue structure after they had already said, "This is what it's going to be." So that took a lot of courage, and I think that was a good thing to have done.

LaBerge: Do you remember who was on the board then?

Maddow: I believe the chair of the board at that time was a man named Ted Hitchcock, and I think Jon Q. Reynolds was on the board. He was the board president later. Helen Burke. I think it was probably Chuck Wright from Richmond. Ken Simmons. And at that time, I can't remember if it was Sandy Skaggs or DeWitt Krueger from the east side. The '78 election was after all of this, and so it's whoever got elected in '74 and '76 that we were dealing with. I ought to remember that better, but I don't.

More on Agreements to Share Water, 1976-1977

LaBerge: Going back to the agreements about the transfer of water and everything: when I was going through some of the papers, I read about agreement number two and agreement number three. I don't know if that's what--

Maddow: That's precisely what I'm referring to. I'd forgotten about that nomenclature.

LaBerge: Okay. And it said agreement number two was East Bay MUD, CCC--what's that, Contra Costa County Water District?

Maddow: Yes.

LaBerge: --Department of Water Resources, and the Bureau of Reclamation. So that's four.

Maddow: That's correct. That's the agreement that provided for the use of the district's #1 aqueduct to pump Middle River water to Indian Slough. The bureau was the water supplier to Contra

Costa. What the state did was to take--the state provided a new intake for Contra Costa's water supply, is what it amounted to. And the bureau had to be involved, because the bureau also owns the Contra Costa Canal. It's operated by and for Contra Costa Water District, but it was a bureau facility, and the state was exercising its legal duty to Contra Costa Water District to try and get better quality water, and so they built this eight-mile extension, if you will, to the intake. And that was a four-party agreement that was written very quickly--

LaBerge: And were you involved in writing it?

Maddow: Yes.

LaBerge: And who else?

Maddow: Oh, gosh.

LaBerge: Were you the only one from the district?

Maddow: No, I wasn't the only one. I was certainly involved. Walt Anton and a man named Orrin Harder, who was the Water Resources Planning Division manager, were both involved. From the Contra Costa Water District, I think it was a man named John Gregg. He's now the general manager of the San Benito County Water Agency. From the Department of Water Resources and the bureau, I just don't recall. I should.

LaBerge: Well, if it wasn't controversial, maybe people's names don't stick.

Maddow: No. I remember that the lawyer for the DWR was a man named John Cape, and I think the main staff person was Wayne MacRostie. But the other names don't come back to me.

LaBerge: Well, then in the other agreement, the different person was Metropolitan Water District.

Maddow: Yes. Agreement number three would have had a bunch of parties.

LaBerge: Yes. It was East Bay MUD, Department of Water Resources, Bureau of Reclamation, and maybe MMWD is Marin.

Maddow: Marin Municipal Water District. San Francisco got involved in that too, somehow, and so did the City of Hayward. I could still take you to the place in the city of Hayward right next to the Mervyn's department store, their big--it's like their administrative building in the old Capwell's, across the street from what used to be Joseph Magnin's, right by the creek there in downtown Hayward, where there are two sets of manholes--two "personnel access structures." [laughter] And in the drought, there was a twelve-inch pipe that stuck out of those two things with two sets of meters on it, and that was the interconnection point. It would move, I don't remember how many thousands of gallons or millions of gallons of water a day.

But it was a very visible, above-ground structure in the middle of a sidewalk about a block from City Hall in downtown Hayward.

LaBerge: Well, there was a memo from Frank Howard commending the staff for all the work through all of it, and particularly you for all the work that you'd put in. So you must have been the main--

Maddow: I kind of was. And I have to say, Germaine, that it was absolutely fascinating, but it wasn't as though we were dealing with somebody who was putting up rock-ribbed, obstinate opposition. We had motivated people who were trying to get something done, and our task was to find a way to make it work quickly and legally and efficiently. Those were the kinds of challenges we had to face and were able to do it.

Woodward Island Right of Way

Maddow: I mean, there were lots of other things that came up. Trying to buy the pumps for the Middle River pump station, and I remember

that we ended up buying used pumps from someplace. Oh, that's not right, that's not right at all! I talked about the fact the San Pablo Reservoir was going to be drained. Well, we had bought the pumps for draining San Pablo Reservoir. When we drained San Pablo, you take that huge reservoir out of the system, you've still got to get water to some places. And so the plan had been evolved before the drought to take San Pablo out of service and to bypass the reservoir with a big pipe, and to move the water through that pipe through some big pumps.

Well, those pumps, the district had already bought. So what it did when the Middle River pump station had to be built was to put them on a truck and take them out there and install them in the Delta for a different purpose. But we needed five and we only had four, or we needed four and we only had three or something like that.

And so a guy named Paul Lindquist, another Old Blue, still around here someplace, who was our purchasing manager, and Walt Anton, they went to work, and eventually they found a pump from an outfit called Dynaquipt or something. And they bought a used pump that had been used I think in the oil industry, that was available, that was clean, and it could be used. Most water pumps are vertical turbine pumps; this was horizontal turbine or something. We had to go through some real nip-ups to be able to buy the thing without competitive bidding, and then to go through the construction contracting wrinkles to get it out there.

And of course, Woodward Island is only reachable by ferry, and so we had to negotiate special arrangements to get access to the ferry when we wanted it instead of when the ferry operator wanted to do it. And then we had to deal--oh, God, now it's coming back.

LaBerge: Well, tell me! [laughs]

Maddow: There were--oh, jeez! We had to get right of way, because the district has the stretch of right of way that the aqueducts are in, but we needed construction space, and then we needed space in

which--I think a portion of the pump station was actually outside the right of way. There was one part of the land on Woodward Island that was owned by a man who was kind of mysterious. I don't remember all of these details, but I can probably turn you on to the person who would.

The district's aqueduct section manager at that time was a man named Al Bonner, and Al was a remarkable man, one of the really capable people, someone who had a tremendous amount of just basic intelligence, but more importantly, he had a basic amount of common sense, and he had no fear of anything. And Al needed all of those things, because at that time, he was in Stockton, and he was a very high-ranking official with the utility district, and he was black. That was very rare back in those days, and he was a guy who got where he belonged on merit and merit alone, and just guts. I loved working with the guy, and I still just think the world of him. He subsequently retired from the utility district, was a City Council member in Stockton, and is now on the board of the Stockton East Water District.

But Al knew this guy, because this guy owned land that was farmed on Woodward Island. Al took the district's right-of-way guy, a man named Walt Goggin, another Old Blue who's dead now, and they went to see this guy out in Livermore or Tracy or someplace. He invited them up to the house, and they sat down on the porch, and as I recall, there was a bottle of his whisky that was involved, and they talked about East Bay MUD needing to use some of his land. After a while, he said, "Do what you have to do." Okay?

And I didn't think too much about that, because I knew that I had the federal government on one side of me and the state government on the other side of me, and a lot of other landowners, and I had the lawyer for the reclamation district on the island to deal with, and I needed a little more than that. So I had to say to those guys, "Go back. He's got to sign something."

So they went back, and he didn't like it and they didn't like it, but he signed something that Walt Goggin had put together, and we got something that I said, "That's good enough; turn the builders loose to go on this guy's land."

Now, this is another one of those anecdotes that I need to be real careful about. I don't remember the man's name, but the story that I was told way back then was that one of the reasons why this man didn't really like to have his name on too many pieces of paper or anything like that was that he was a very wealthy farmer, with land there on Woodward Island and elsewhere, but the rumors were that much of his profits from his farming operations eventually went to some political cause in Great Britain or something like that.

So I never knew whether that was true, and I was always fascinated by it, because here's this guy who had--if in fact it was true--that kind of sympathies, and here East Bay MUD sends in this remarkable black man, who just was about as effective a public servant as I've ever known, and at the end of that conversation over that bottle of whisky, this man, who was apparently motivated by these larger political causes, looked at Al Bonner and Walt Goggin and trusted them and said, "Do what you have to do." I always loved that story; I just thought that was great.

Anyway, those were some interesting aspects of all of that.

PG&E License on the Mokelumne

Maddow: I have one more little anecdote that I will tell you that relates to that same period of time. It's a little off the drought stream, but it fits in some respects.

One of the things that was going on in parallel with all of this had to do with the regulation of the PG&E water storage

facilities upstream of East Bay on the Mokelumne. The City of Santa Clara was attempting to take over the license that PG&E held from the Federal Energy Regulatory Commission. It was kind of a first case of its kind. There was quite a battle in this country over what was called the municipality preference, and whether a city like Santa Clara could exercise that preference, and kick an investor-owned utility off the river after their original Federal Power Commission license had expired. The original Federal Power Act[1] looked like that could happen.

Well, we were very interested in what would happen, because of course, the utility district and PG&E have a very carefully dovetailed relationship that's expressed through a series of court decrees about how the Mokelumne is operated. PG&E is interested in operation for hydroelectric energy, and of course, the utility district for domestic water. How they interrelate is very important to the productivity of the East Bay water system. If somebody was going to take it over, like Santa Clara, we wanted to know about it. So every time something was going on with Santa Clara, we would get involved.

There was a meeting one time having to do with one aspect of the PG&E relicensing and the Santa Clara effort, and it was up in some meeting room in Sacramento. This was at a period of time when we were all struggling because of the drought circumstances. There was a gentleman there from the U.S. Fish and Wildlife Service who was asserting that the PG&E system needed to be changed, because it was not releasing sufficient water from their dams to keep fish below those dams in good health. It's a much more common thing that we deal with now, but that kind of an argument was heard from Fish and Wildlife back then.

The PG&E man who was there knew their facilities very well, and for the particular facility he was talking about, Salt Springs Dam, which was a huge dam, very, very tall, and a huge reservoir behind it the size of Pardee, very deep canyon. He

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[1]Federal Power Act, 49 Stat. 863 (1935). [Renumbered by 92 Stat. 3148 (1978)]

said, "You know, there is some water that flows below that dam all the time." It's basically gallery leakage and through one little pipe, and my recollection is it was seventeen cubic feet per second that flowed continuously. He said, "The only other way we could get water out of that dam is through an eighty-four-inch sluice valve that was a part of the original construction, and it has never been operated since the original construction, and if it was operated today, we first don't know if we could get the valve open, we're quite sure we couldn't get it closed, and we are afraid that opening it could lead to the type of problems that could threaten the safety of the dam. So we aren't going to do it."

And the Fish and Wildlife biologist pounded his fist on the table, and he said, "Well, damn it, you could throw a siphon over the top and get the water the fish need!" [laughter] And you know, that for me was kind of harbinger of things to come with all the other battles we're all having with Fish and Wildlife Service and getting fish flows out of reservoirs.

Now, you said you wanted anecdotes; that's why I gave you that.

LaBerge: Yes, that's good. What happened with that?

Maddow: Well, eventually, there was a lot of litigation, there were a lot of FERC hearings, and eventually, the Federal Power Act was amended in something called the Public Utility Rates and Policies Act, PURPA, of--I think it was 1978.

But in any event, PG&E got a new license. Santa Clara eventually got more or less a settlement that allowed them to get access to some other power facilities, and Santa Clara continues to be a very active player in the public power field as a part of the Northern California Power Agency and things like that. But they didn't get the PG&E system up on the Mokelumne. As a matter of fact, I don't think any systems like the PG&E system ever were

transferred on the basis of the municipality preference. The law changed, is what basically happened.

LaBerge: On that note, another thing that I saw--oh, there was permission for East Bay MUD to collect PG&E bills at the San Leandro office.

Maddow: Oh, yes.

Changes in Focus from Fifties to Eighties

LaBerge: And when I saw that, I thought, Oh, that's interesting. I wonder what the background of that is? Was it convenience, or--?

Maddow: Yes, it was a combination of convenience and the two entities trying to find ways to streamline their operations. That sort of thing is still going on. There's a business office now in Walnut Creek which I think was originally a PG&E office where it's also an East Bay MUD customer service center, or at least you could pay your bills there.

And what happened, for many years, the utility district, in what I call the old days before electronic data processing and all of that, the district had business offices in a lot of locations, I think five or six of them. And the business office managers had quite a presence in their local communities. They would be involved in service clubs and that sort of thing. That was all harkening back to the days in the late fifties when the utility district had this huge bond issue that went on the ballot, $252 million, $258 million, to build Camanche Reservoir, and Briones, and the third aqueduct, and things like that. It was called the Big M. That was a huge undertaking in the fifties for the utility district, and people who ran the local business offices were a big part of getting chamber of commerce support, and Rotary Club, and those kinds of things.

What you saw when you came across the memorandum about East Bay and PG&E working together on bill collections and that sort of thing was just a reflection of the fact that, by the time we got into the seventies and beyond, it became less likely that people or entities like East Bay MUD were going to maintain very many remote business offices, and so the district has kind of cut back in a good part of that, does much more now from remote locations through telephone and that sort of thing.

But it has established throughout the community a whole lot of places where people can go and in effect pay their bills at the local pharmacy or some such thing. And that's done through just a series of relatively simply collections agreements and that sort of thing. The utility district has never had any problem with any of those that I'm aware of. I think the initial problem was getting over the sort of mental block of actually sitting down and working with an investor-owned utilities people. My goodness, how can we do that? We're different. But I can't think of anything that got terribly exciting about it, except that there were some old-fashioned thoughts that had to be kind of changed as that went on.

And then in the eighties, when the utility district was working much more in the era of water conservation, it then went the other way and established a new business office which really focused on water conservation activities, particularly in the areas in the warmer climates east of the hills, and that's the so-called Alamo business office. I don't know whether that's what it's still called. But it was the counter-current. It was not so much because the utility district was looking to have a business office presence out there. It wanted to have this other form of presence, the water conservation presence, and so its water conservation activities were largely focused there. Some real knowledgeable professional people with water conservation as their sole profession have worked out of there. There are also other business office functions there, I know, but that's been a big one.

LaBerge: That's the main thing.

Maddow: Yes, I think so. I don't know exactly how it's configured now.

Go down the rest of your list and let's see what else you want to talk about.

LaBerge: Okay. Was there any other legal issue about changing the rate structure? Did EDF at some time challenge your rate structure?

Maddow: I don't remember an EDF challenge to the rate structure. I do remember EDF becoming concerned about the rates from a couple of perspectives. EDF has always been one of the environmental organizations that has viewed market forces as being a valuable tool in regard to conservation of natural resources, and they have always been an advocate, for example, of the tiering of rate structures and--

LaBerge: Oh, I didn't realize that.

Declining Block Rates and Chevron

Maddow: To some degree, we did have an earlier issue, although it was primarily an economic issue and a financial issue more so than a legal issue. That was back when I first went to the utility district, it had what were in those days called declining block rates. The theory of it was, the economy of scale. In those days, and I think probably still today, the utility district's largest water customer was the Chevron refinery in Richmond. Now, for the average--let's say the single family residential customer, if you look at the load curve on a daily basis or a weekly basis, you'll see great fluctuation as the water is turned on to take showers in the morning and run the dishwasher at night, and water the lawn whenever that is. You'll see the load curve for the individual customer go up and down like that. [motioning] For Chevron, it's a flat line. It's a big line, because they're using a lot of water, but it doesn't vary very much. And so from the standpoint--

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LaBerge: Okay, you were talking about the declining block rates, and Chevron.

Maddow: Chevron in particular was the most dramatic example, because they were the largest customer. But they probably had the flattest load curve, because that's a refinery that's basically going all the time. They were using water for cooling purposes, and there wasn't a great deal of variation in the way they took water. So once you've built that infrastructure to get the water to them, you don't have a lot of variable costs, and therefore, depending upon how you recover your fixed costs from the ratepayers, you probably--the economies of scale would suggest that you probably can charge them a lower unit price than you can somebody for whom you have to build in the facilities to handle the peaks. You don't need a peaking reservoir or pump for a Chevron.

In between Chevron and the residential customer, in those days we had packing plants, for example. There used to be a lot of fruit and vegetable packing plants in San Leandro and Oakland. They're not there any more, but in those days, they were huge seasonal users. If you think about the rate curve or the demand curve for Chevron, and the single-family residents, and then you think about those packing plants, packing plants would be taking very little water maybe eight months of the year, and then <u>huge</u> amounts for several months.

<u>Changing Times Bring New Needs and Different Costs</u>

Maddow: So can you put all those people on the same pricing structure? From the financial standpoint, and this became more of a factor after the drought and after these economic problems the district had found itself built into, there are a lot of questions that began to be asked about how one goes about recovering the revenues that it needs, given the characteristics of the customer

base that you had, and given the fact that there were increased demands as the demographics of the population changed. And by that I mean, the utility district hasn't really grown that much in terms of the number of people within the service area in the last twenty-five years. It's probably still somewhere between a million one and a million two. When I went to work for the utility district, I think it was a little less than a million one.

But what's happened is, that same number of people is living in a lot more houses and apartments. Because it used to be, I don't know, three people, three and a half people per dwelling unit, and now it's maybe 1.8. The houses are spread out more. You've got people living in Hercules and Pinole, which weren't anything more than little company towns twenty-five, thirty years ago.

So the utility district was faced with the sort of double-barreled challenge of making sure that as it went forward into this period of revenue needs--the district needed to raise more money--and a changing rate base in the sense that the packing plants were starting to disappear and we weren't seeing those big commercial loads come in, industrial customers were going away. And this sort of increasing number of dwelling units in areas to which new facilities were going to have to be extended and that sort of thing, what's the best way to go about raising revenues that you need?

And at about the same time, of course, in the late seventies, the utility district began for the first time to really pay real close attention to questions of whether growth was paying its own way. I have to say that from a political perspective, the arrival on the board of Helen Burke really brought those questions to the fore in a very pointed way for the first time. The questions had been there before, but they hadn't been as pointed. And I have always given Helen Burke a great deal of credit. For a long time, the votes would be six to one on some of the issues that she was concerned about, but she held her ground and she was very effective.

In any event, what happened with regard to the rate structure was that there were a number of shifts that ended up having to be made. The district moved away from a declining block rate to more of a flat rate commodity charge. The district altered the mix between that portion of the water bill which is a pure commodity charge, which is just volume-driven, and that part which is really the service charge, which reflects elements of the district's fixed costs.

But the biggest change was that the district began to charge a much higher price for new connections. The district began to focus much more clearly on what facilities were going to need to be constructed over time in various parts of the district, and who ought to pay for them. And so for the first time--and this was work that Frank Howard was very involved in, much more so than I was--for the first time, the utility district began to look at this balance between what part of the new facilities should be paid for by existing customers and what part should be paid for by growth.

So through the seventies and on beyond then, the utility district began to evolve a fairly sophisticated system of looking at facilities and determining what their costs would be. The district is divided for this purpose into--it used to be, I think it's probably still the same--into seven planning regions. If you go to hook up a house in one of those regions, you're going to pay what they call a system capacity charge that will be different region by region, depending upon the facilities needs in that zone.

In addition to that, the utility district began to look at other factors in its economic picture, and out of that evolved something called the elevation surcharge. If you live up at the top of the hill, when you get your water bill, if you look, there will always be a line that talks about the elevation surcharge, and that line is intended to say that people who are receiving water from facilities which require pumping--it's primarily related to pumping--they should be bearing the cost of

installing, maintaining, and operating those systems to move water to that elevation.

Marginal Cost Pricing

Maddow: All of this was a part of looking at a whole variety of more market-related economic forces and trying to put them into the district's revenue mechanisms. One of the big questions that always used to be debated, and EDF had a piece of this, was whether or not the district should engage in something called marginal cost pricing. Should we be raising the price of water in effect to the point where people would be much more conscious of how much the next unit of water that they used was going to cost? There was a consultant who we used back then named Harrison Call. I think we first knew Harry when he was at a firm called R. W. Beck from Seattle, and he had done a lot of work on the marginal cost pricing theories related to electricity.

Then he began to look at it from the standpoint of water, and despite some of the things we used to hear from some of the people in the EDF about how water ought to function like other commodities in terms of the elasticity of demand as price went up, what we were always finding through Harry's work and all the rest of the work we could find was that the elasticity of demand --the coefficient of elasticity of water was very low, because the basic price was so low. But if you priced it high enough so that there would be a higher coefficient of demand, you would be pricing beyond the actual cost of the water. And even before some of the constitutional amendments that we've had since these debates began were enacted, we always knew that we were supposed to be pricing at the actual cost of the water, or something close to it.

And so we did have debates at the policy level, not so much legal arguments, not so much litigation in those days, but there were lots of debates about those pricing issues. They resulted

in I think a pretty modernized economic program at East Bay. It's been looked at by a lot of other utilities as kind of a model. Los Angeles Department of Water and Power has done a great deal with it now on seasonal variations. They now, in addition to an elevation surcharge, they now use a seasonal rate concept where water is thought to have much more value in the hot months, and therefore, it ought to be priced a little higher, and those who use more in the hot months will suffer from it.

While I was driving to this interview today, I was on the telephone with Bob Helwick, who's now East Bay's general counsel. Senator Richard Rainey [spells] from out in Contra Costa County has recently asked the California attorney general for an opinion as to whether Proposition 218, the "Right To Vote On Taxes Act," which was passed by the voters last November [1996], whether or not it prevents East Bay from being able to use tiered rates as a part of its regular pricing structure, or whether the Proposition 218 procedural requirements apply, and also whether some Proposition 218 substantive requirements about charging the actual cost, whether those would apply. It will be interesting to see how that works out, because if Rainey's theory is correct, it could have a significant impact on some of the revenue-raising mechanisms that East Bay and others are using. Prop. 218 has some pretty onerous provisions that would be difficult to apply to ordinary rate-making. So anyway, that's a subject that will go on and on.

The utility district has had some litigation on this issue. An organization called WATER--Water Allocation Through Equitable Rates, I think, or something like that--it's headed by a man named Charles Brydon [spells]. They sued a couple of times, trying to challenge the rate structures that the utility district was using in the drought in particular in the eighties. They didn't get very far with their case in the eighties. Eventually, it ended up with a court of appeals decision in the utility district's favor. I think that decision came down in 1993 or early 1994. I believe it's cited as Brydon vs. East Bay MUD. I don't recall it offhand.

LaBerge: And were you the one who--

Maddow: The case was started while I was still general counsel. I didn't litigate it myself; people who were in the office did. Verna Bromley in particular had a major role in litigating that case, also Nancie Ryan. It was interesting because Mr. Brydon feels passionately about this cause, and worked as hard as he could to try and find a way to state a cause of action, and frankly had some difficulty doing it. The utility district won the case for what I thought were good reasons. Probably the easiest way for you to get at that if you want to start asking me questions would be to go and take a look at the opinion. I'd have to go back and refresh my memory on it.

But that's the only real serious litigation about the form of the rate-making that the district had.

I should tell you that the pattern of system capacity charges that the utility district uses is to some degree being replicated at the Contra Costa Water District with what it calls its Facilities Reserve Charge. They have very significant litigation underway with the Building Industry Association of Northern California about their Facility Reserve Charges. The reason I think that they're getting that litigation rather than East Bay is that the pace of development is much quicker in the eastern portion of their service territory than it is anyplace in the East Bay service territory. The price per house in the Contra Costa service territory is much lower, and as a result, these Facilities Reserve Charges have potential for a bigger impact on the housing market, so the builders are fighting very vigorously on those issues.

Taxation of EBMUD Real Property by the Mountain Counties

Maddow: I guess if we want to talk about economics, there's one other thing I could touch on for a moment that I had a major hand in.

There's a provision of the California Constitution that says that real property owned by a public agency outside its jurisdictional boundaries, that real property is subject to property taxation on the value of the land alone, not on the value of the improvements. That constitutional measure was adopted back in the sixties after years of debate about whether the mountain counties, as they styled themselves, could tax the water systems of Los Angeles, San Francisco, and East Bay MUD. And to make a real long and bothersome story short--

LaBerge: Well, you can go into it. That's one of the things on my list. We're talking about Amador, Calaveras, and San Joaquin?

Maddow: Yes. In the seventies, the utility district began to look at some fairly dramatic increases in the way in which its property up-country was being assessed. This was prior to Proposition 13 when property tax rates were really rising in a lot of places, and the utility district was seeing some of that. The utility district was at that time, I think probably still is, probably the second largest taxpayer in Amador County. Maybe that's changed now, but in those days, there was a lumber company that was a bigger taxpayer, but that was the only one.

Essentially what happened is that the utility district, in acquiring the property for the Pardee Reservoir back in the twenties and the early thirties, had acquired one piece of property that had a characteristic that the counties called a "water right." It wasn't a water right, but they called it a water right, and they taxed it as a water right. They put an enormously large value on it. When Jack Reilley got wind of it, he wanted to do something about it, and that started several years of arguments.

Essentially, what the utility district had done was to condemn a piece of property that was owned by a man named Lloyd Thayer, who was a kind of an entrepreneurial type, who was aware that in the twenties, East Bay was coming up onto the Mokelumne to build this big enterprise, and he bought a piece of property which looked like it might be a moderately decent damsite

downstream from Pardee. He got the city of Lodi to help him finance an operation up there, and he formed something called the Colorado Power Company, and actually scratched out at least one abutment, I understand. Well, I think I've actually seen it once in my life. There is actually a notch where you can see the abutment of the site of old Thayer Dam, which was never built.

His idea was that he would build a little dam across there, impound some water, maybe make a little power out of it, and have some water to sell to Lodi and others. His real idea was that he was going to get rich off East Bay MUD, and to a degree he did. [laughter] So East Bay MUD ended up filing a condemnation case, and the man who filed it I guess was probably Ted Wittschen, who was the first real general counsel, and he did a very smart thing. It's kind of like when people want to keep a piece of property from being developed now and they don't buy the property, they buy a development right. East Bay condemned something that the courts characterized as being in the nature of an easement against Mr. Thayer's right. And the easement was defined as being that portion of Mr. Thayer's fee simple ownership that would have allowed him to develop and operate a dam and a little pond--it wouldn't have been a reservoir; it just would have been run of the river, riparian-type ponding--at that location.

In first-year law school, they sometimes tell you that when you think of the concept of fee simple in regard to a piece of property, it's all these sticks that, gathered together into a bundle, represent fee simple. One of those sticks is what East Bay condemned. Didn't take the whole bundle; just took the stick.

Ever since then, that stick has been on the tax roll in Amador and Calaveras Counties. The river is the boundary between the two counties at that point. And a couple of very inventive county counsels and assessors came up with the idea that they would start boosting up the assessment of that right over the years, and we ended up having to challenge it.

The way in which the constitution allows you to challenge this type of assessment is to go to the State Board of Equalization. The state board primarily exists for the purpose of equalizing the assessments between the counties. At least, it did that prior to Proposition 13. That's no longer a very big function. And they are also the assessment appeals body for the regulated utilities and the railroads and people like that, but then they also have this function for these public agencies. They almost never have hearings on public properties.

Experts and Compromise

Maddow: We filed protests to the assessments, paid the taxes under protest, and filed applications for equalization assessment and adjustment, or something like that--filed applications with the state board, and eventually took them to hearing over a couple of years. Filed some lawsuits which were never actually served, never actually litigated. After a very long period of time, we ended up essentially with the parties agreeing on a modus operandi from that point forward. The counties agreed to fix the value of the water rights and not escalate them, and we agreed to accept the method of assessment that they were putting on the acreage the district owned. They were assessing it at a higher value, we thought, than really was warranted. But by the time it came time to decide whether to pull the trigger and actually serve those lawsuits and battle it out with those counties or not, a lot of harsh words had been exchanged, and the utility district has to live in Amador and Calaveras and San Joaquin Counties. And so it really didn't want to pick a huge fight with those entities, and they didn't really want to have a huge fight with us either. So we looked for a way to compromise, and as is so often the case, the definition of compromise is that everybody goes away a little bit angry, and that's pretty much what happened.

We had some real battles. We had some very good people who were the experts on either side. I frankly think we had the better of it in terms of our experts and our preparation and our ability to--we pretty much destroyed one of their witnesses on the valuation of the water rights on cross-examination, and he's never let me forget it. We've actually been able to communicate since then.

LaBerge: Who were your experts?

Maddow: Our principal expert on the overall case was a man named Norm Murray. His first name was Angus; Angus Norman Murray, who had been the regional director of the Bureau of Reclamation and then had opened a consulting firm called Murray, Burns, and Kienlen [spells]. Norm Murray was [in accent] a Scotsman who was a cigarette smoker, and a fast mind and wit, and just absolutely told it like it was, and was a wonderful witness. Norm was our valuation witness who in essence said that none of the theories that the counties were using for valuation of this water right would work, and he wrote an excellent report on it.

We also had a man named Dave Willer [spells], who was from a firm called Tudor Engineering. We used Dave as a rebuttal witness to counter a theory under which the counties were trying to establish a value for the old Thayer right. We had an appraiser named Jack Keeler [spells], who was from up in Fairfield. He was our property appraiser. Jack Reilley and I litigated these cases. I did most of the work, in particular in the year when we had the big hearing, which was I guess the '77 tax case. I guess we probably had that hearing in '78 or '79.

Bill Parsons was the person from the district's real estate section. I guess it was called the Land Division in those days, and Bill and I worked very closely on these things.

I'm trying to remember the names of the people who worked on these matters for the counties. The county counsels I remember well. John Hahn was then the Amador County counsel and still is. John and I developed a kind of a love-hate relationship over the

years. We've really fought, but I think it's fair to say we really like each other. You know, in our own ways, I guess we became good friends. And I still can call up there and get his secretary, Audrey Parker, and she says, "Well, Bob, when are you going to come up and see me?" kind of thing.

The county counsel of Calaveras County was George Huberty. Excuse me, he wasn't the county counsel, but--let me get this straight. There was a time when George Huberty was the county counsel in Calaveras, and Joe Huberty, his brother, was the county counsel in Amador. But then Joe Huberty became a judge in Amador, and I think George--I guess he stayed on as county counsel, but then at some point, he was no longer county counsel and he was doing this as a private attorney.

And what's that guy's name from San Joaquin? I can see the guy from San Joaquin, but I can't think of his name. Very nice guy. Terry Dermody.

Then the assessors were Charlie Clark in Calaveras, who was just a great sort of country gentleman. And I can't remember the name of the guy in Amador.

They had a guy who was the manager of one of the offices in those days of the firm of CH2M Hill, who was their expert on the valuation of the Thayer right. He's the guy who we just tore apart on cross-examination. He had absolutely--by the time he was done, we had him talking to himself, because he had tried to put together a case to value the right which just wouldn't work. I don't consider myself a litigator, but that, from the standpoint of cross-examination, was one time I think I did a pretty good job.

We ended up getting decisions from the board which resulted in tax refunds being paid to the utility district, primarily based on the right, and as I say, after a couple of years of flailing away at one another, a decision was made to walk away from those battles and come back and look another day.

Effect of Proposition 13, 1978

Maddow: I don't know what's happened in recent years. Just as I was leaving East Bay MUD in 1993, a gentleman who was then, and I think is probably still, in the property section there, a man named Steve Boeri--I think he may be the head of the property section now--he was starting to look at those taxes again. Now the issue would bring in Proposition 13, which of course changed the whole basis for assessment of real property. It's at least possible that a whole new round of arguments would have to be fought. This time, the argument would be whether or not Proposition 13 provided still another way, another limit, on the way in which they could assess this property.

You see, what had happened in the early days was that the counties wanted to tax the properties in a way in which basically they would be taxing the value of the water extraction systems that San Francisco and Los Angeles and East Bay developed. A man named Bob Phillips was the general manager of the Department of Water and Power of Los Angeles back in the sixties. He was principally responsible for the negotiation of what ended up being a constitutional amendment that was passed by the legislature and approved by the voters; it established this special formula for taxing the properties of public agencies. In effect, what it says is there's a formula that was established for setting a base year, and then that base year could be escalated on a certain factor that was set forth in the [California] constitution. The assessors were limited to assessing on that formula, or at the market value, whichever was lower.

And so the arguments that we were fighting over with the counties were always, Is the market value less than the formula value? And they would always want to escalate up to the formula and then some, and we would always say, "Wait a minute, the market value is less. The market value of this water right," we said, "was zero."

Proposition 13 would allow the assessments to escalate at a rate that would be less than the Phillips formula, but query as to where the Proposition 13 value would be in relationship to market value. So the utility district may now be facing a question of whether there's this third basis for value. I think there's been some litigation involving San Francisco's properties up in Tuolumne County and probably in Alameda County. I believe San Francisco is still taxed on more acreage in Alameda County than any other taxpayer, under this same theory. So I believe there's been some more litigation in that area, but frankly, I've kind of stopped paying attention to the issue, after all of those years of battles.

Bob Maddow as Litigator

Maddow: I told you that I'm not really a litigator. I'll tell you one little anecdote from all of that.

On one particular day when Dave Willer was our witness and I was examining him on direct examination, Dave had a terrible day. He just was not confident, he just did not handle himself on the witness stand very well, either on my direct or on the cross-examination by Mr. Hahn, or by the man from San Joaquin whose name just came back to me: it's Terry Dermody [spells]. He was deputy county counsel at that time.

We finished our day in the hearings, and we were staying at the Red Lion Hotel in Sacramento out near the fairgrounds. We went back to our rooms, and I all of a sudden just felt exhausted. I said to Jack, "Look." Normally we would meet right after the day and prepare for the next day. I said, "I'm going to need a little time," and I went back to my room and lay down, because my head was spinning, I'm sure my blood pressure had gone to a thousand. I actually think I fell asleep for about twenty minutes, but I left a wake-up call thinking I might have that happen, and I arranged to meet the guys for dinner.

So we went down for dinner, and I still had on the suit and tie and everything that I'd worn to that day's hearing. We went to someplace where they had Chinese food. Jack ordered foil-wrapped chicken. And sure enough, I pick up one of the things, and you know it comes in the little envelope, and I touch it, and it erupts on my tie. And this gout of whatever's in the foil, the juice and all that, goes on my tie. Jack laughed and said, "You must be wearing a new tie!" Of course I was, and it was stained beyond repair.

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Maddow: But I have to tell you, it was perfect, because it brought me back to earth, got me out of my funk. We had dinner, and after dinner, I sat down with Dave Willer--it was primarily me and Dave--and I talked to him a little bit, and by golly, the next day--

LaBerge: Coached him?

Maddow: I didn't--what I tried to do was to say, "Dave, you know this stuff. You know the answers. You know it better than the man who's cross-examining you. And I have a chance for redirect, so." And he went in the next day and he was great. He just really kind of pulled himself back--it wasn't what I did, it was what he did.

But what Jack did with that little one-liner of his was to break me out of this rut that I'd fallen into that day, and I think he just saved my bacon, you know. [laughter]

LaBerge: Well, it's the power of the sense of humor, too, isn't it? You need that.

Maddow: You really do. And these were hard days. We just went at it hammer and tong with John Hahn. He's a tough guy, and he's a good lawyer. We really battled it out with them, and so these were hard days. Especially for somebody like me who wasn't a litigator.

But we learned a lot in those days, and I formed a very healthy respect for the people in the mountain counties and the work that they do, and the relationship that they have to that utility. And vice versa. I think I learned a lot about the utility at that time. I really had to learn a lot about how water resources work and a lot of water law in order to be able to deal with the Thayer water right, et cetera.

And it also gave me an occasion to study a lot of the history of the Mokelumne system, and it's a fascinating history, as is the history of each of the older systems. So it was just a great grounding for anybody who tries to look at the historical and sort of the policy side of things, which has always been kind of my nature. So it was terrific experience. I hesitate to claim it as a great victory, because although we did get the utility district's taxes reduced, we always ended up thinking that we could have done more, had we actually litigated those cases. But I think it was the right thing to do to not litigate the cases, because it preserved the working relationships between the counties and the utility district, and I think that's very important. You don't want to be at constant war with them. So I think that's been important.

Hiring Outside Counsel

LaBerge: Well, do you think Mr. Reilley kind of put you in that situation to give you the experience?

Maddow: I think he definitely did. There had been an earlier round of tax cases in the sixties under another legal system, prior to the Phillips formula and all that, and he'd fought those battles. I don't think he wanted to be out front. He had too many other things to do as the district's general counsel, and I think he had a reasonable amount of faith in me. And as I say, the first year, we kind of worked together, and the second year, he pretty much turned it over to me. It was great experience.

By the same token, it was a little difficult in that I had been carrying a fairly broad set of responsibilities at the district dealing with a wide variety of contract matters in particular, and while I was in the tax cases, I just pretty much had to shut everything else down. That was hard on my colleagues, and hard on some of the people who had relied on me for legal work. But you end up having to do those things sometimes. It's hard in a small office to take on major litigation projects. That's what I learned from the tax cases, and that's why, when I became general counsel, I was a little more prone to look for outside help on cases than Jack had been. My immediate successor, Alice Vilardi, was much more interested in litigating things in-house if possible, and was headed in a direction of building up the size of the legal staff in order to be able to carry more of the litigation load and not have to use outside counsel as much as I had done. Alice wasn't there long enough for me to be able to comment, or maybe even for her to be able to comment, on how well it worked. Bob Helwick has told me that they are still using outside counsel for some things.

What's happened, I think basically, is that the legal entanglements that entities like East Bay become involved in now are so complicated that the big cases are hard to litigate exclusively with your own staff, if you're also trying to be house counsel. So it's always a balancing act.

LaBerge: Well, I noticed there was--oh, it was like a review of all the departments. Mr. Reilley had to do a review of the legal department and what they were doing, and one of the issues--or the board must have asked for this review--one of the issues was, should you be hiring so much outside counsel? Is it cost-effective? Or should you be doing it in-house? And his recommendation was, we should be running the legal department just the way we do.

Maddow: I don't recall that specific incident, but I can certainly recall the consideration of that issue at a variety of times. I mentioned before that at the end of the drought when the district's financial reserves went quite low and that sort of

thing, and the Prop. 13 era came along, the district went through an era which I used to jokingly call the cut, squeeze, and trim era, when there was a real serious effort at cost-cutting and streamlining and realigning things. That was at a time in the late seventies and early eighties--

LaBerge: This thing was 1979, I just found it.

Maddow: Yes, that's right in that period.

LaBerge: It was an organizational study of EBMUD.

Maddow: I don't remember the exact details--there were several organizational studies that were done over time, and if I really paid attention to it--. That one may have been headed up by a firm the first name of which was Cresap [spelling]--Cresap, McCormick, and Padgett. That may have been their version of the reorganization study. And it was, How can we function better? How can we realign, et cetera? And in part, that was driven by some new board members who had heard the message of the voters at the Proposition 13 election and who were aware that the district had some horrendous rates. You know, we came out of the drought, declared the drought over, and immediately ended up having to look at a rate adjustment because big capital projects like rebuilding San Pablo and Chabot Dams were being pursued, and the district's financial reserves had been decimated. That rate increase in 1978 was very controversial. It really angered a lot of the ratepayers. As a matter of fact, it brought us lots and lots of candidates in the 1978 election when there had been virtually no candidates, no contested seats before that.

So we had a board that was motivated to find ways to do what in the nineties is called downsizing, and to streamline and reorganize. And there were a lot of things that were done. But the legal department by that time--let's just think about that a second--by that time, the legal department consisted of Jack, Frank, me, and Bob Helwick. It didn't change. In 1981, we added a fifth attorney, Nancie Ryan. Nancie McGann when we hired her, now Nancie Ryan. That was the first time there had ever been

five. I think I was the first of the fourth attorneys. Wayne Witchez left, and then Bob Helwick came in to be four, Nancie came in to be five. Jack basically kept the size of the office the same.

What we did with outside counsel in those days was largely in the insurance defense cases, tort defense cases. We didn't have the huge resources litigation matters at that time. The only big resources case we had going was the American River litigation, but it was not a big case then. It was a critically important case, but it was Bob and Jack writing briefs, because it was all being handled as a matter of law at that point. And when we have our day when we're just going to talk about the American River, I'll talk more about that.

In 1984, when I took over, in the first week I was general counsel, I think it was the third day, all of a sudden, that case went on the fast track towards trial. It was going to be a huge trial, and there had never been any discovery. There'd never been any workup towards trial, and there was no way that the lawyers we had in the office at that time--Bob, Frank, Nancie, and myself--that we were going to be able to handle that.

And so, for the first time, we went to outside counsel for a big, significant matter, and we went to the man who at that time I considered to be California's leading water lawyer, Art Littleworth of Best, Best & Krieger in Riverside, to help us out. It was the right thing to do. But it set a pattern that made some directors and managers uncomfortable, because we started to spend a lot of money with outside counsel.

III THE AMERICAN RIVER CONTRACT AND CONTROVERSY, 1968-1994

[Interview 4: March 27, 1997] ##

Historical Background

LaBerge: We decided that we would talk about the American River today, so why don't you give me the background that you had when you came to the district?

Maddow: I came in May of '72.

LaBerge: The district already had its contract with the Bureau of Reclamation. Had EDF [Environmental Defense Fund] already filed the suit?

Maddow: No. That happened shortly thereafter.

LaBerge: What was your involvement?

Maddow: Well, let me take a step back and then come forward. The congressional authorization for the Auburn-Folsom South unit of the Central Valley Project was, I think, in 1965, and shortly thereafter, '67 or '68, the Bureau of Reclamation began construction of the Folsom South Canal. Auburn Dam was also getting started at that time. It subsequently was stopped, and I'll touch more on that a little later, but the Folsom South Canal was constructed--actually, I think 25 or 27 miles of the

canal was built, basically from Nimbus, the afterbay reservoir below Folsom Dam, down toward the southern parts of Sacramento County.

The utility district had decided back in the sixties, I guess, that its future water supply demand projections outstripped its supply, its safe yield from the Mokelumne system, and so an alternative or supplemental supply was needed. The goal was to obtain one of quality as close to that of the pristine Mokelumne quality as possible. So the district's water supply planners and its lawyers began negotiations with the United States to try to buy water from the Folsom South Canal. The American is a high-quality stream, and by taking the water out of the canal it was thought that you'd be getting about as high a quality water as the Bureau of Reclamation could produce, depending upon where you got the water from the canal.

Those negotiations were proceeding through the late sixties. Jack Reilley was the utility district's lawyer who worked on those negotiations, along with people from the engineering function. And I think there may have been consultants who were also involved--Norm Murray and Harvey O. Banks.

The bureau's negotiating team included a well-respected attorney named Rita Singer.[1] I cannot verify this, but I was told that when the negotiation meetings were in Oakland, she would bring empty bottles with her and fill them with water--high-quality Mokelumne River water--at a faucet next to the district's parking lot!

At the same time that the utility district was trying to contract for water supply from that canal, others were, as well, including Sacramento County, and there were interests from both San Joaquin and El Dorado Counties, which were also quite interested.

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[1]See Rita Singer, Oral History Interview, Conducted 1991 by Malca Chall, Regional Oral History Office, University of California, Berkeley, for the California State Archives State Government Oral History Program.

At that time, it was believed that the Auburn-Folsom South unit would be a productive unit because Auburn Dam was conceived as having a fairly significant water supply yield, and there were entities in all three counties--El Dorado, Sacramento, and San Joaquin--that wanted some of that yield, as did the utility district. I think it was in 1968 that an organization that was called--the acronym was SRDWA, S-R-D-W-A.

LaBerge: Oh. Sacramento--

Maddow: Sacramento River Delta Water Association? I think that's probably right. And SRDWA, as I recall, was basically El Dorado, San Joaquin, and Sacramento Counties or entities from within those counties. What they were trying to do was to get an agreement with the bureau that would enable them to, in essence, protect their right to contract for some of that water, the theory being that they were the counties or the areas from which at least some of that water originated and they should have sort of a local priority towards the contract negotiations. There are statutory priorities in the water code that are claimed by counties and agencies within watersheds from which Sierra streams originate.

There were others who were also interested. Auburn and the Folsom South Canal were thought as providing the backbone for something called the East Side Division of the Central Valley Project service area. That would have been a way in which to move federal water south in a facility that would be farther east than the existing water conveyance facility (the Delta Mendota Canal). And there was a group called the East Side Project Association, or something like that, which was also interested in dealing with the bureau.

Agreement with U.S. Bureau of Reclamation and Others, 1968

Maddow: But to make stories that I only know bits and pieces about short, the utility district entered into an agreement with the Bureau of Reclamation, SRDWA, and the East Side Division group that was in effect a way in which to say there will be contracts available for these various entities, and here will be their relative relationship with one another. And that agreement provided for the utility district to have the right to contract for I believe it was 70,000 acre-feet of American River water, regardless of what happened with the balance of the arrangements being made by the bureau. And then, under some contingencies, the district would have the right to an additional 80,000, making a total of 150,000 acre-feet or 134,000,000 gallons a day on an average annual basis.

State Water Resources Control Board Decisions 1356 and 1400

Maddow: That agreement was then blessed, if you will, or acknowledged by the State Water Resources Control Board, when it decided on the water rights applications that had been filed by the Bureau of Reclamation for Auburn Dam, in what was called Decision 1356. I think 1356 was in '68 or '69, right along in there. So after the four-party agreement and Decision 1356 took place, the utility district executed its federal water supply contract in 1970.

When the state board decided 1356, it reserved jurisdiction with regard to instream flow needs, recreational values, fish values, et cetera, on the lower American. There was a separate water rights proceeding, and that decision was made, I believe, in April of 1972. It was called Decision 1400.

LaBerge: Okay. I've heard of that.

Maddow: And Decision 1400 was noteworthy because for one of the first times, maybe *the* first time in a really significant decision, the state board adopted what was basically an instream protective flow regime, which said in essence that the federal government's right to take water into its system, assuming that the Auburn Dam was constructed, was going to be limited in ways which were intended to protect fisheries and recreation values. There were flow standards that were set up, et cetera.

East Bay's right to take did not appear to be impacted by that water right, because East Bay's contract was independent of the existence of Auburn Dam. East Bay contracted for water from the Auburn-Folsom South unit, and East Bay was careful to be sure that whether or not Auburn Dam ever got completed, East Bay could in fact get 70,000 acre-feet of water and then upon the occurrence of these other contingencies or the lapse of the effectiveness of those contingencies, it could go up to 150,000. So East Bay thought, "We're okay. The Auburn decision doesn't really impact us. We're okay."

And so the utility district signed the contract, and late in 1972 the bureau announced that in fact it was ready to deliver water to the utility district at these gates, turnout gates, structures in the side of the Folsom South Canal, down near Grant Line Road in southern Sacramento County. The significance of that was it meant that starting in 1973, the utility district had to start paying for the water, had to pay for it, regardless of whether it takes it.

I can remember in the first month that I was there in May of 1972, when I started to hear about this to me unknown thing called the American River, one of the things that people were talking about was that there was this man named [Ronald] Robie,[1] who was a member of the state board. He was vice chair at that time, and he had written a paragraph that got into Decision 1400.

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[1]See Ronald B. Robie, "The State Department of Water Resources, 1975-1983," an oral history conducted in 1988, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1989.

It said in effect that it was inappropriate that the utility district contract with the federal government to take the water out at Folsom South Canal because that meant the water would not flow down the lower American River, where it could be put to multiple beneficial uses, as he put it, and the utility district could pick it up later.

The utility district didn't agree with that. It thought that Robie had thrown in something that was unnecessary, and there was a fair amount of consternation about it because he was a respected member of the state board, with considerable clout.

LaBerge: Jack Reilley talked about that. He was still--

Maddow: I think livid is the right word.

LaBerge: Fuming [laughing].

Maddow: I don't know whether Jack believes this or not, but in the mind of some people, the Robie paragraph spawned the American River litigation because it was in June of that year that the Environmental Defense Fund, the Oceanic Society, the Save the American River Association, and four individuals brought suit in state court, arguing that the utility district should not be taking water from Folsom South Canal, that the decision as to the point of diversion was inappropriate as a matter of state law, and that perhaps equally importantly the utility district shouldn't be taking any more water anyway because, after all, it could reclaim wastewater and achieve or accomplish the same water supply needs that the supplemental supply was intended to meet.

Litigation: Environmental Defense Fund (EDF) I, 1972

Plaintiffs

Maddow: The individuals who filed that suit--I think I can remember them all. Two were people here, quite well known locally. Jean Siri, who is now, I think, a member of the East Bay Regional Park District board. She was an El Cerrito city councilwoman for many years, very active in environmental organizations, and is a delightful person. Makes no bones about the fact that she is a dedicated environmentalist. She's a good person. Her husband is Dr. Will [William] Siri,[1] who is one of the founders of the Save the Bay Association, I think, and is credited with much of the work that led to the creation of BCDC [Bay Conservation and Development Commission]. They're good people.

And then there was a woman named Lucretia Edwards, who was from Richmond, who is still active in a number of environmental organizations.

Gerry Meral, Gerry with a "G," who later served as deputy director of the Department of Water Resources when Ron Robie was its director and who is now the director of the Planning and Conservation League. He was at that time staff scientist for the EDF.

The fourth person, I think, was named Peter Zars, Z-a-r-s. I think he was a member of the Oceanic Society. At some point they dropped out of the case, and so did he, and I don't remember the details of that. But I think he was the fourth person.

In any event, at the time I arrived at East Bay, the utility district had started work on implementing the contract. It had

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[1]See William E. Siri, "Reflections on the Sierra Club, the Environment and Mountaineering, 1950s-1970s," Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1979.

formed a special unit within the engineering organization, headed by a gentleman--another Old Blue--named Rich Kolm, who was then and is now one of my neighbors--our children went to school together. His daughter, Peggy, who graduated from Berkeley, got her Ph.D. in molecular biology from M.I.T. in June, 1997. The district had hired the consulting firm of Jones & Stokes to write an environmental impact report. If you remember, we talked earlier about the fact that we were just entering into the era of environmental law.

Environmental Impact Reports

Maddow: And right away, evaluations were underway to determine the best way to route an aqueduct from the turnout point on the Folsom South Canal to the East Bay service area. The district was at that time looking hard at an alternative which would have involved building a pipeline to that turnout point in southern Sacramento County, going basically directly west, crossing under the Sacramento River in a siphon structure, proceeding west to a point where the right of way would intersect with, I believe, then an abandoned right of way at the old Sacramento Northern Railroad, which headed basically on a straight line--what would that be?--southwest toward a point I think down near Chipps Island. It would have had to come across, under the western Delta, in probably a big tunnel structure, and then popping up in Contra Costa County and tieing into the Mokelumne aqueduct right of way.

So that work was underway, EIR work, et cetera, when the lawsuit was filed. The lawsuit didn't stay that work or anything like that, but after not too much more time elapsed it became evident that the district was going to run into problems in proceeding with that work. I don't remember the exact sequence, but the work was in effect put on hold somewhere along in the early seventies. I don't recall whether that EIR was ever

completed. I don't believe a draft EIR was ever issued for public review.

Sacramento County Joins Plaintiff Group

Maddow: From the legal perspective, initially it was just the plaintiffs whom I mentioned. Several months later, six months later maybe, four months later, something like that, Sacramento County intervened in the case, with their intervention handled by the county counsel's office. The county counsel was a man named Lee Elam. And their intervention took a different tack than the environmental groups had started with. They in essence said that the county had a particular interest to protect in the recreational and aesthetic values of the lower American River. They had invested in a parkway along there. They had done a lot of things, spent money, et cetera, to protect that or to achieve the values that the river provided.

There was incredible irony in Sacramento County's entrance into this case, because it too was counting on a water supply from the Folsom South Canal--a bigger supply than East Bay MUD's. When the bureau built the canal, it constructed a 5-gate turnout structure for the district; about 100 yards north it built a 7-gate turnout to serve the Sacramento County entitites for which the water agency--the board of supervisors was its legislative body--was attempting to contract for over 200,000 acre feet per year, as I recall.

The county's argument was that the utility district's diversion of water upstream of the parkway would be an unreasonable method of diversion of water in that it would deprive the parkway region of the lower American of some of the flows in a manner that was in violation of the state constitution. The utility district filed demurrers. We in essence said, "These plaintiffs can't state a cause of action." I've forgotten the exact sequence. I believe the demurrers were

filed prior to Sacramento's intervention, and then a subsequent demurrer--I've forgotten the exact sequence.

But in any event, it all culminated in a series of amended complaints, et cetera. The district's original demurrer against the environmental groups was sustained. They amended, they incorporated Sacramento's arguments about the recreational and aesthetic values into their amended complaint; the utility district again filed a general demurrer saying, "These plaintiffs can't state this cause of action against this defendant."

Judge Brunn Sustains Demurrer, 1973

Maddow: That general demurrer was sustained by the Alameda County Superior Court. The judge who heard the matter was a man named George Brunn, who was actually a municipal court judge from this district, Berkeley district. He had been sitting on special assignment on the superior court for a short time. I've forgotten the exact details. At one time, I think I told someone he was up there for one day. I think that's incorrect.

But in any event, through some sort of luck of draw circumstance, he ended up with this case. My recollection is that we got the judge's decision sustaining the demurrer in the early part of 1973, March, April, somewhere along in there. And he told us to prepare a judgment, and we immediately did. We didn't send it off. I was told to take this up to the court, submit it to the judge, wait until he signed it--you know, because the utility district really wanted this.

So here I am. I had been at work there a short while. I was not a litigator. Hadn't really been terribly involved in this case because Jack had been handling it himself. We all knew something about the case because all the lawyers in the office at that time--Frank Howard, Wayne Witchez, Jack, and I--each of us took a part of the writing of the briefs and that sort of thing.

We each had our section. But I was a little bit new to all of this.

So I walk in, hand the clerk the judgment and go sit outside and wait. After a few minutes, the clerk says, "The judge would like to see you." And I go, "Oops! Now what?" I went in, and he absolutely wanted to talk about this case, because as a muni court judge, he said, you don't get this sort of thing every day. He told me how he had taken the briefs home at night and he had spent the weekends and he had put all this time into writing his decision, and he had written a very thorough decision.

He was particularly cognizant of the limitations of what a superior court judge could do in this challenge to what was basically this combination state and federal law scheme that had evolved through this water supply contract, and he noted where those limitations were. He wrote what I thought was just an excellent decision, recognizing the limitations on what a trial court could do. And he ruled in the utility district's favor and said, "Those plaintiffs couldn't state those causes of action against this district."

In effect, he was saying there is a partnership now, a contractual arrangement, between the water district and the federal government that is principally a creature of federal law, and these plaintiffs have only sued the local agency. They've got to get at the other entity as well. They've got to get at the federal government, and they can't do that in state court. And, in effect, federal law preempts them from applying or seeking to have state law applied to just what the utility district is doing.

Similarly, he said that with regard to the argument that the utility district should be reclaiming wastewater in lieu of seeking an additional surface water supply, he said there was a comprehensive system of law under which that issue needs to be addressed before state agencies, rather than being brought initially to the court. And, in effect, he ruled that the plaintiffs had failed to exhaust their administrative remedies.

They should have brought that matter before the State Water Resources Control Board.

The plaintiffs appealed. The case began what I have sometimes referred to as the seven-year march, up and back to various and sundry appellate courts. Bob Helwick, who came to the district in 1976, did much of the research and writing from the time he arrived until, well, Bob actually has done most of the writing in the case. The utility district was successful in the court of appeal. The case went to the state supreme court in what is commonly known as *EDF I*.[1] I think it's in Volume 20 of California Third.

In effect, Judge Brunn's ruling on our demurrer stood up, and his arguments about both federal preemption and exhaustion of administrative remedies were sustained.

LaBerge: When he called you in to talk to you, is there more on that story? Like, did he ask you questions that--

Maddow: He wanted to talk about the case. He wanted to talk about this federal contract relationship. He wanted to know why I thought these plaintiffs had chosen to not sue the federal government and to bring the whole action in federal court. I don't remember exactly how I responded at that time, but they made a conscious decision at the very get-go that where they wanted this case to be decided was in a state court, on a state law basis, because the whole area of federal law was one in which they were afraid that they could not prevail. They frankly thought they had a better shot of prevailing by stopping the local agency from being able to contract with the federal government, rather than stopping the federal government from being able to contract with a local agency. I recall discussing that with Judge Brunn.

I also recall Judge Brunn being concerned about the thought that wastewater reclamation could be a substitute for what the utility district had identified as future drinking water needs.

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[1]EDF, Inc. v. EBMUD (1977) 20 Cal. 3d 327.

The facts hadn't ever been argued in any of that, but I remember that he had a concern about that because he didn't understand it.

There's not really a whole lot more to that story, but it was fascinating to me that here we had a judge who had never really seen anything like this, who wrote what I still consider to be the best opinion that's ever been written in the matter. We've had lots of other opinions, but I just thought he did a heck of a job.

LaBerge: What about that wastewater issue? Was that really a non-issue?

Maddow: No, I believe that these plaintiffs were very serious about that issue. But they never were able to get it started from a litigation standpoint. In other words, Brunn's decision stood up and was sustained both in the court of appeal and in *EDF I*, by the state supreme court. In effect, later, when they were allowed to amend their complaint after *EDF II*, that whole issue had dropped out of the case.

Now, reclamation has certainly not disappeared, and the utility district is one of the leaders in the field of reclamation. It's just that it is not being approached through the legal avenue that the Environmental Defense Fund tried to set up at the beginning. Instead, reclamation is being seen as a part of alternatives analysis when water projects are evaluated. In other words, there is a type of focus on reclamation that EDF thought was appropriate. It's just that in today's world it comes later in the project planning process than they were, I believe, trying to advocate when they initiated that part of the litigation.

LaBerge: You were talking about Bob Helwick and the seven-year march.

Maddow: The case was not real active. The utility district was not at a point where it was really pressing forward with planning to implement the American River project. In part, that was because the litigation was still going on, and in part because the utility district was otherwise occupied. Certainly, there was an

interest in it. I mean, after all, in 1976, '77, and '78 we went through this horrendous dry cycle, and we all knew we had to get back to the American issues. But while the case was still on appeal there was such a cloud hanging over the district's ability to proceed that it was not actively pursuing the project at that point.

U.S. Supreme Court and the Delta Decisions

Maddow: Now, after the first decision, EDF sought a writ of certiorari from the United States Supreme Court at that point. And fundamentally they were concerned--well, they were hoping to get the Supreme Court to review this question of whether or not federal law preempted their argument in which they were trying to attack the utility district's ability to contract with the federal government.

At the same time that the Supreme Court had EDF's certiorari petition up there, the court got what became the case of the United States v. California,[1] that grew out of the "Delta decisions." You know, there was this series of state board decisions concerning export of water from the Delta by the state and federal government. The decisions were challenged. My recollection is that in the Delta decisions, U.S. v. California, I think there were something like twelve lawsuits that all were treated as a consolidated case.

In any event, there was a federal preemption question that was right at the heart of that case, as well. The United States Supreme Court decided U.S. v. California I think in '78 and in effect said there's a role for state law in dealing with federal water projects, and the role in essence is that state law will govern the activities of the Bureau of Reclamation with regard to water rights, water supply, water quality, except when the

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[1]California v. United States (1978) 438 U.S. 645

exercise of state law would be inconsistent with congressional actions, with specific federal legislation.

Well, the U.S. Supreme Court then disposed of EDF's petition[1] for certiorari by sending the case back to the state supreme court for reconsideration in light of U.S. v. California.

LaBerge: Was that the title of that case, U.S. v. California?

Maddow: I think so. It was either U.S. v. California or California v. U.S.

LaBerge: Is that the Racanelli decision?

Maddow: Oh, no. Racanelli is the decision on the next generation of Delta water cases. This decision grew out of the earlier round of what we now call Bay-Delta. We didn't call it Bay-Delta in those days. We called it the Delta decisions in those days. I think we're dealing with Decision 1378 in the Delta decisions, and Racanelli was dealing with Decision 1485.

Litigation: *EDF II*

Maddow: The case came back to the state supreme court. It was the [Chief Justice] Rose Bird court. Bob Helwick argued the case. I still remember that he stood up and was ready to talk, and Justice Bird wasn't ready to have him start talking yet. I remember how gracious she was in saying, "Just a moment, please, Mr. Helwick." Somehow, that's kind of rivetted in my mind.

The supreme court this time ruled that these plaintiffs could state a cause of action against the utility district.[2]

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[1]439 U.S. 811 (1978).

[2]*EDF II* (*EDF, Inc. v. EBMUD* (1980) 26 Cal. 3d 183)

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Maddow: -- which was written by Justice [William] Clark, who was a [Governor Ronald] Reagan appointee to this court and subsequently was in the Reagan cabinet, wasn't he?

LaBerge: Yes.

Maddow: I've forgotten exactly what his position was.[1] Maybe Secretary of Agriculture? I've forgotten. I should remember that. I think he was Secretary of Interior. But in effect the court held that the plaintiffs could allege that the utility district's diversion of water upstream of the lower American River constituted an unreasonable method of diversion of water, under Article X, Section 2 of the state constitution and the parallel statute, which is Water Code Section 100.

Now, up until then, what the appellate decisions had said was that these plaintiffs couldn't seek the aid of the courts to interrupt or interfere with or examine the decision of the utility district in its efforts to contract with the federal government. With this decision now they got the opportunity to question those decisions. They amended their complaint, the utility district demurred, arguing a whole series of arguments that were fairly similar to what had been argued prior to EDF II, those demurrers were overruled, and my recollection is that that was probably in, like, 1981, somewhere along in there.

LaBerge: And all along is Bob Helwick still doing the--?

Maddow: Bob was carrying the bulk of the writing load. Jack was the key strategist. I had a role in it in the sense that I was part of the office, and Jack spoke to me in regard to the strategic and tactical stuff. But Bob was the key writer. Bob is far more a litigator than I ever was, and from the very beginning Jack had

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[1]William Clark served as Secretary of Interior, Advisor to President for National Security Affairs, and Deputy Secretary of the Department of State.

him doing research and writing on this case. It was always sort of planned that way.

LaBerge: And is he the one who did the argument, too?

Maddow: He argued the case before the state supreme court, yes, and in other forums; Jack argued the earlier phases, but Bob carried more of the load later.

LaBerge: Okay.

Water Action Plan under General Manager Jerry Gilbert

Maddow: So after our demurrer was overruled there in '80, at this point the utility district was in the post-drought period. It had hired a new general manager, Mr. [Jerome] Gilbert, who, ironically enough, had been the executive officer of the State Water Resources Control Board at the time the Decision 1400 was written. He and Jack Reilley and I had a couple of interesting and sort of never finished conversations about the famous Robie paragraph [laughing], which Jack was still livid about. Jerry disclaimed any responsibility for it. And accurately so. It was really Robie's work.

In any event, Jerry Gilbert was much more active in regard to the district's water supply planning in his early years with the district than Mr. Harnett, his predecessor, had been in his later years. Jack Harnett had tried mightily to get this contract off the ground and was frustrated through this litigation and a variety of political developments, and so I always think he went away a bit not defeated but frustrated by his inability to complete that project. He had thought it would be built during his time there. Then Jerry Gilbert thought it would be built during his time there, and that didn't work either.

But in any event, the district was starting in, in Jerry Gilbert's early days there, on a much more comprehensive approach to its future water supply needs. In fact, what was evolving as 1983 unfolded was the early stages of what was at that time, I believe, called the district's Water Action Plan. It was a comprehensive look at where the district's water supply and water supply system was headed, and implementation of the American River contract would be a part of that planning effort. The planning effort was being scoped out; it wasn't being carried out. It was being identified and articulated as an effort that needed to be done. It hadn't started yet.

Well, the litigation was still out there and was now, you know, some time or another, somebody was going to have to worry about how to resolve that litigation. But since the utility district didn't have any current plans for project implementation, I think the plaintiffs rested easy, but the Action Plan was coming.

I don't remember exactly what triggered it, but discussions began about the possibility of settling the case, and in late 1983, after it was known that I was going to replace Jack and prior to the time that Jack left, there were discussions between the lawyers, with Jack and Bob Helwick carrying them out. I was aware of them, but these were continuations of the litigation discussions.

So there were discussions about the possibility of finding a way to structure a settlement. In effect, the basic concept was to recognize the coming Water Action Plan would have environmental documentation, and to have the plaintiffs dismiss their case without prejudice to their reopening it if they chose to attack the decision that came out of the Water Action Plan and the environmental documentation for the Water Action Plan.

My recollection is that in return for their agreement to dismiss, the utility district was going to agree to pay attorneys' fees to the environmental organization, and I have a vague recollection that that was a number that was just $40,000

or $30,000, after all those years. And that just is a reflection on different economic times. But it's also a reflection of the fact that this case had been a paper case up until then. There had never been a single deposition taken. There had never been a single interrogatory. Nobody had ever thought about an expert witness, or witnesses at all. Because there were demurrers and motions and briefs that were filed, and it was basically the kind of lawsuit that one or two lawyers could handle. The case basically had gone to the state supreme court for two written decisions, and to the U.S. Supreme Court, on a general demurrer.

It looked like the settlement was in order and in good shape at the end of 1983. As a matter of fact, it's my recollection that several of the entities had already signed the settlement agreement. In particular, I believe Mr. [Tom] Graff had signed. He was representing the environmental organizations. But on the second or third working day, the third working day, I think, of 1984--I became general counsel January 1, 1984, right?

Attempt to Settle Fails, 1984

Maddow: It seems to me it was Wednesday or Thursday of that week, I get this call from Lee Elam, and he says, "I'm sorry, but the settlement is not going to work. The board of supervisors is not going to authorize me to execute the agreement." What had happened, basically, was that a difference of opinion of some sort, the details of which I have never known, arose between EDF and the Save the American River Association, and Save the American River Association was apparently able to contact the Sacramento area political people, members of the board of supervisors, and the settlement fell apart.

Well, the first thing we did was to pull out the timetable because, you see, during the march up and down appellate court calendars, the five-year statute of limitations for bringing the case to trial had been tolled by action of law, not by anything

the parties had done. What we needed to do was to go in and say, okay, when was the case at issue since that starts the five-year period? And after we deduct all the time on the appellate court calendars, when does the case have to go to trial? And we figured out it had to go to trial in about six weeks.

Preparing for a Trial on the Facts

Maddow: Not a single bit of discovery had ever been done, and what was clear after the overruling of our demurrer was that this case was going to be tried on the facts. It was going to be a question of determining reasonableness of our point of diversion, which was going to lead inevitably to our having to put on a case based upon drinking water quality as being the motivating factor for our set of decisions, and balancing that set of factors against the potential for adverse impact to stream flows, recreation, aesthetics, fisheries, et cetera, in the lower American River.

That's a factual case. You don't put something like that together in six weeks very easily, we didn't think--especially when Jack Reilley had just left; Frank Howard wasn't working at full strength at that time; Bob Helwick and I were pretty busy as it was with other things; Nancie Ryan was in the office but was at that point primarily doing work for the district's personnel department and some of its administrative functions and so she was very busy and quite new to the district. So we were a little bit strapped!

Hiring Arthur Littleworth's Firm, 1984

Maddow: One of the first things that Bob and I decided--Bob and I talked about, and I talked to Jack, and I decided, frankly, because in hindsight, if we had to do it all over again, I don't know

whether Helwick would have done it the same way. But what we did was the right thing to do. We started thinking about attorneys who could assist us in this case. The first call I made was to a man named Art Littleworth at Best, Best & Krieger in Riverside. Art was not available, and so I got his partner, Dallas Holmes, who is an old friend. Dallas is now a superior court judge in Riverside County.

I said, "We've got this case." Of course, they all knew about it because this case had been to the state supreme court twice and everybody had read about it. I said, "We have a problem here." And Dallas said, "Don't do anything until I get back to you or Arthur gets back to you. We'd love to work on this." Well, it was going to take a little while, and Arthur was a very busy man at that time.

And so, to hedge my bets, I made a second call. I called a man named Paul Engstrand, from a firm called Jennings & Engstrand, down in San Diego. They represented the Imperial Irrigation District. The reason I called Paul was that at that time Imperial was facing a series of allegations, both in litigation and before the state board, that its water use practices were in violation of the same provisions of the constitution that were at the heart of our case, Article X, Section 2, and the reasonable use doctrine.

And so I knew that Paul had done a lot of legal work on these issues, and I thought he is an experienced litigator and water law professional who has a big firm behind him and who has been working in this area. I really liked and respected him. So maybe.

I called a third person. I called a woman named Anne Schneider. I had first met her when I think she was still Anne Jeffrey, and she was a very young lawyer I think out of the [U.C.] Davis Law School, who had really impressed me in some work that she had done for the Governor's Commission to Revise California Water Law, which had been--let's see, who appointed that commission? I guess it was Reagan when he was governor. It

was chaired by Chief Justice [Donald] Wright, and it had a staff which included Anne Jeffrey and Cliff Lee, who is now in the attorney general's office, and two or three others. And it had, as members of the commission--there were quite a number of people, but the person who really stood out among the commission members was Arthur, Art Littleworth. That's where I had really formed an opinion that at that time he was the very best of California's water lawyers. He and Adolph Moskovitz just were head and shoulders above everybody else at that point in my mind.

But I loved the way Anne wrote, so Anne was one of the people I called. She was a young lawyer with a Sacramento law firm at that time, and it just wasn't going to work out for her to be able to play the lead role I would have wanted her to play, had we been able to use her firm.

But as it turned out, my first choice was Arthur, and Arthur was available and just jumped at the chance to work on the case. I wanted him because not only was he knowledgeable, not only was he just a terrifically effective writer, but he has a statesmanlike quality about him that I thought was going to be very important. At this time, the utility district had a board that was very environmentally conscious, and here it was being sued by environmental groups. I thought it was very important that we had somebody who was going to be not a lightning rod type attorney but someone who would have statesmanship and diplomacy among working attributes, and Art was just the epitome of all that.

So in early 1984, in January, we went to the board of directors and got authority in closed session to retain Arthur's firm to assist the district in this case.

LaBerge: And the board was the new environmental board? Or only partially?

Maddow: No. This was 1984. The real strong environmentalist on the board at that time was still Helen Burke.

LaBerge: But not Nancy--

Maddow: Nancy Nadel had not yet come on the board. Helen was at that time a very effective board member, but she didn't have other votes, so her effectiveness was in argument and helping to position the board. Probably, if I can use sort of the political spectrum by way of analogy, Helen's role on the board resulted in the board as a whole moving further to sort of the political left, if you will, than would have been the case otherwise. She had a significant impact in that respect.

There was also a man on the board named Jack Hill at that time, who was Helen's closest ally on the board. Jack was not as active an environmentalist as Helen, but he certainly was sympathetic with many of her concerns. We had a good board, sensitive board, hard-working board. It was still very much caught up in trying to run the utility district in the most businesslike and cost-effective manner it could, but it also knew about the significance of this issue. And so we got unanimous board authorization to retain Arthur and his firm to represent the district in this case.

Statute of Limitations Issue: Meeting at Norman's

Maddow: A week or two after that, we had one of our first big strategy meetings in Oakland. Arthur couldn't be there that day because he had to make a court appearance in another matter. The two lawyers, partners from his firm who came up were named Ron Kohut, and Dick Anderson. We had a morning meeting which included myself and Bob Helwick and the district's technical team, but the general manager wasn't there. We had arranged to have lunch with him at a restaurant called Norman's.

LaBerge: Oh! I remember Norman's.

Maddow: Is that on College?

LaBerge: College and Alcatraz?

Maddow: Was it Alcatraz? I can't remember that part, but I know it's College. Across from the Buttercup right there by where now Dreyer's Ice Cream has its headquarters, I think. Well, anyway, we went into one of those tables at Norman's. Remember, it was kind of dark and it had these heavy lights hanging right over the table. Big, fluted glass shades. Very heavy [motioning]. And we sit down, and we start to tell Jerry Gilbert the outcome of that morning's efforts. Key to our strategy was we don't have time to put this case together from the standpoint of preparing our factual information, so our collective recommendation of the general counsel and special litigation counsel is that the utility district seek to enter into a stipulation with the plaintiffs to extend the five-year statute so that we don't go to trial in six weeks.

Well, the general manager said, "Absolutely not." In much stronger words. And I'll never forget it because not too long after that, maybe fifteen minutes later, Dick stood up to go to the rest room, and he darn near knocked himself out on that light fixture. I'll never forget it, because he kind of stood up like that [demonstrating], and literally all of the color went out of his face at that point. I think that was the last day we ever saw Dick Anderson on that case [laughing].

LaBerge: [laughing]

Maddow: He just couldn't--that just--boy, that was hard for him. But in any event, the other side was interested in stipulating, and at that point we thought that it would be prudent to stipulate, to buy ourselves some time to put together the case. Jerry said, "No dice. We'll go ahead on the basis of what we know. We know our water quality case and our water supply case better than the plaintiffs can possibly know their recreation and fisheries case by the time this trial is supposed to open." And so we said, "Okay."

LaBerge: In the district, does he have the final say?

Maddow: Well, yes. Yes, in the sense that if it came to a confrontation between me and him before the board of directors, there was no way I would have prevailed. I was the brand-new general counsel, and he was the very experienced general manager. But it's much more than that. The general manager, under the municipal utility district act, runs the district. The general manager of a municipal utility district has authority that is more akin to a strong city manager than anybody else in government that I'm aware of. It's a stronger type, a more thorough and comprehensive type of authority than the general managers of most water districts have.

And this general manager clearly had the support of the board, and when he said we were not going to stipulate, that was all there was to it. We certainly discussed it. We laid it all out, we told him what all the options were. I don't mean to sound like I'm being critical of him, because I'm not. He was fully advised, both before and after he told us what he wanted done, and he made the conscious choice, and we said okay, and we did it.

Trial Before Judge Bancroft, Alameda County, 1984

Maddow: And so the trial actually opened I think it was April 9, 1984. By this time, it was clear to the county and the environmental groups that they were not ready to go to trial, and they started looking for a way to buy time. So we were more ready than they were. Let's put it that way. We weren't really ready, but we could have done it. After all, we were defending. They had to go first, and they had the burden of proof, and so we figured that we could cross-examine them in a very effective way and defeat much of what they had to say, and by the time they were done, we would have a case in chief to put on in defense. So we were ready.

On the first day of trial, Sacramento County put on one witness. He was a county parks official who testified about the American River Parkway, Sacramento County's American River Parkway. And I've forgotten the exact sequence, but as I recall, Save the American River Association was no longer represented by Tom Graff. They had split, and there was a man who was a lawyer --I can remember what he looked like, but I can't remember his name--who was a member of SARA's board, who appeared and my recollection is what he said was they needed more time to get independent counsel.

Sacramento County appeared through an attorney named Dennis DeCuir. Dennis was a litigator with a Sacramento law firm of McDonough Holland & Allen. That was Martin McDonough, who was one of the real stalwarts of California water law through the fifties and sixties. He faded a bit towards the end of the seventies. I think he passed away in the early eighties. But in any event, they were a very well-respected firm. Still are.

Dennis DeCuir had been engaged by the county counsel's office to play the same role for the county that Art Littleworth was playing for the utility district. And they made a motion to send the case to the State Water Resources Control Board under Water Code Section 2000. They asked the court to request the board to serve as referee, in effect, on issues that were within the board's particular area of expertise.

That was kind of galling to us because, after all, we had defeated the allegations with regard to wastewater reclamation on the grounds that these people should have started before the state board over there. But here we got to the point where we were ready to settle the case. The other side was unable to reach full agreement on that. We said, "Okay. We're going to go to trial. We're going to go quickly. We're not going to fool around." And lo and behold, the other side comes back and says, "Oh, let's go to the state board."

The judge at that time was Richard Bancroft.

LaBerge: Where are we?

Maddow: We're in the Alameda County Superior Court, and the judge is Richard Bancroft, who frankly had never seen anything like this case and was beginning, I think, to feel like it was going to be a bit overwhelming. Which it was. And I think he welcomed that motion. In essence, between April the ninth and sometime in November, it was very clear that the motion was being granted.

Referral to State Water Resources Control Board

Maddow: A lot of effort on the part of lawyers ensued between April and November to get the judge to the point where he was willing to sign the order, actually referring the case to the state board. He made it clear very early on that he wanted to send it to the state board. Frankly, we thought going to the state board was probably not the worst thing in the world because we felt very confident that we could do well there, because we thought we had a strong case, not because--I'm not saying on the basis of politics or any of those things. We just thought that we had a strong case from both a legal and factual standpoint.

In any event, we resisted, but the judge ruled that the case would go up there. It took until November for him to sign the order containing the twenty-one issues of law and fact on which he wanted the assistance of the state board with its particular expertise, prior to the time that he ruled on the case that was before him. What was before him was a case seeking injunctive relief, declaratory relief, and a writ of mandate, in effect compelling the utility district to do something other than take its water out of the Folsom South Canal.

For example, one of the allegations was that the utility district should use its best efforts to rescind or re-form the contract, and the judge was being asked to do that on the basis of an argument that the contract provided for a point of

diversion which was unreasonable as a matter of law. He said, "I can't rule on that until I get these twenty-one questions answered." The parties got a chance to help shape those twenty-one questions. We won some, they won some, the judge went his own way on some.

And so in November we headed off to Sacramento.

LaBerge: Still with Art Littleworth's firm?

Maddow: Yes. And it was primarily Art. Ron Kohut, who was a litigator, was part of the team. They had a young associate named Ariel Calonne, who is now the city attorney of Palo Alto, one of the brightest and most hard-working attorneys I've ever known. He had the capacity to grind out [snapping his fingers once] more paper in a short time than just about any lawyer I've ever known. Good paper.

By this time, Mr. DeCuir had been replaced by Stuart Somach. Stuart had been in the office of the solicitor of the Department of the Interior. He had been the Bureau of Reclamation's lawyer, and he left federal service and went to McDonough Holland & Allen. This I believe was the first case he handled for them, or at least one of the first cases. Stuart is a very fine lawyer and headed up the team for the county.

At this point, the county had moved to center stage.

LaBerge: Okay, the County of Sacramento.

Maddow: Up till this time, Tom Graff had been the primary lawyer on the other side, and Lee Elam had a more secondary role. But by this time, when the case had evolved into something where there was going to have to be mastery of a lot of facts, Somach took center stage, and the county took more of a lead role. EDF was represented by Tom, still, but he began to bring in John Krautkraemer. John is dead now. He was killed in a tragic skiing accident here about two years ago.

LaBerge: That name is unusual. I think I remember that.

Maddow: Outstanding man. Really a fine person and very good lawyer. It was one of those shocking, tragic deaths. Just a very young man.

But in any event, Tom and John worked on the case. John had more of the laboring oar during these years. Tom certainly was involved, but he had lots of other things he was doing as well, of course.

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LaBerge: Okay, so you had two interventions.

Hearings Before the State Board, 1984-1988

Maddow: Yes. The case reached the state board in November or December of 1984. In early 1985 the state board staff began to carry out a series of meetings. It was almost like scoping what it was that they were going to have to do, because their first task was to prepare a work plan to take to their board to show the board how they were going to go about accomplishing the court's order.

LaBerge: Was Ron Robie still--

Maddow: Ron Robie was no longer on the board. At this time, he was the director of the Department of Water Resources, appointed by Governor [Edmund G., Jr.] Jerry Brown.

Some of the parties with whom these SWRCB meetings were held included state and federal agencies. The Bureau of Reclamation, the California Department of Water Resources, the California Department of Fish and Game, for example. And the state board began a process of developing this work plan, developing a schedule for the submission of evidence, interviews with expert witnesses were to be conducted, et cetera.

The County of Sacramento put in an extensive bunch of material. The environmental groups just kind of followed them along, didn't add anything of their own. But it wasn't too long after that, later in 1985, that the California Department of Fish and Game decided that it would intervene in the case, or seek to intervene, on the side of the plaintiffs. Their intervention was for the purpose of addressing issues related to fish and wildlife that could be affected by the district's diversions above the lower American River. The significance of having the Department of Fish and Game come in is--the principal significance, other than the obvious symbolic significance of having a state agency file against you, is that it brought in the attorney general's office. So now the California attorney general joined the attorney team on the other side.

And not too long after that, a second state agency, the State Lands Commission, did the same. I remember Art Littleworth telling me on the telephone one day that he felt like he was watching a football game in which the official ought to throw a flag and say that there's now a penalty for "piling on."

LaBerge: [laughing]

Maddow: In any event, the Lands Commission intervened because under state law and the California Constitution, as I recall, the Lands Commission has jurisdiction over the bed and banks of streams. And so their intervention was for a limited purpose, and that is to deal with riparian issues. I don't think those interventions were inappropriate, from a legal perspective. It sure didn't help things to be going in and telling our board, however, that we now had two state agencies and two separate deputy attorney generals in the court room, the water board room, et cetera.

In any event, the state board proceedings began to unfold. The board originally had estimated that it would be about two years, and as I recall, a quarter of a million dollars [$250,000] to do this work.

LaBerge: Who pays?

Maddow: We had to pay for it--that is, the parties did. In the long run, it took much more than that. Well, the state board got the order in November of '84, and they issued their final report in June of '88. They conducted lots and lots of interviews. The staff had a process that they used where it wasn't direct and cross-examination or anything like that, but the parties identified their witnesses and prepared reports and exhibits, and the state board staff and an engineer and a lawyer and an environmental specialist, three or four people. And they spent a lot of time working with the legal and technical teams of the parties. Literally weeks of meetings, not consecutive. You know, there would be three days here and two days there. But lots and lots of time was spent in exhibits--

The State Board's Team

LaBerge: Any specific persons that were--

Maddow: You mean from the state board?

LaBerge: Yes.

Maddow: The head of the team was a man named Ed Dito. Ed was an engineer. The lawyer was--I'll give you the way his name appears everyplace. M period, G period, Buck Taylor. [M. G. Buck Taylor]. Buck is a guy who I had met back in the days of the drought stuff, and also Buck and I had worked on Penn Mine back in 1978. He was the lawyer for the regional board.

But in any event, they had oh, gosh--they had an environmental specialist named Doug Albin. They were significant. Ed Dito was the most significant, and Buck. Ed was called the program manager. He was an engineer by profession, but they called him the program manager. The engineer was a man named Mark Stretars. They were a pretty good team.

The state board doesn't have all the resources in the world and can't always devote as much attention to a case as those four men devoted to this case. But frankly they did a pretty thorough job. They looked at all of the evidence produced by all of the parties, including interviews with expert witnesses and lots and lots of technical reports. And did so as staff for a regulatory agency should do. They came to it with no bias, they were objective, they were as tough on one party as the next. Frankly none of these things are ever perfect, but I thought they did a pretty darn good job.

It's easy for me to say that in one respect because I frankly think that the decision that they rendered was more favorable to the utility district than it was to the plaintiffs. But I'm trying to separate that and just tell you that the way in which they went about their work was tedious and slow, and we all griped about that, but I frankly think they did a pretty good job and produced a pretty good report.

They initially produced a draft document in February of 1987. It was in five or six volumes. There was an executive summary and then a legal report and a lot of technical volumes. Altogether it's a stack of paper about six inches high. When they initially asked the parties to submit evidence and reports and materials, one of the things they asked the parties to do was to submit proposed physical solutions. Now, a physical solution is a real important doctrine in California water law. The term really goes back to a supreme court case called Lodi v. East Bay MUD.[1] A 1936 supreme court decision which in effect says that when there are conflicting and competing claims to a limited supply of water, that one of the things that the court can do is to fashion a compromise solution that allows some of those competing and conflicting claims to be satisfied. It's a sort of formalized way of reaching a compromise. It's an encouragement to the court to look to these kinds of things.

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[1]Lodi v. East Bay Municipal Utility District (1936) 7 Cal. 2d 316.

Proposed Physical Solutions

Maddow: To its credit, the state board recognized early on that a physical solution might be possible. We worked really hard on our physical solution. My recollection is that it was our Exhibit 33, although that may be way off. I have a copy of it, and I'd be happy to let you borrow it. I won't let you keep it, because it's the only one I've got. The district may have others, but--it has an exhibit number on it.

But all of our documents were in these sort of brick-red covers like this [the file in his hand]. I don't know if I have an exhibit number on this. No, I don't. I'm pretty sure it was our Exhibit 33. And what we basically did was to make an offer to subordinate our take of water to those instream flows that were a part of Decision 1400. Remember I said that Decision 1400 was in the Auburn water rights decision. By 1985 we were pretty sure there wasn't going to be an Auburn Dam for a while.

LaBerge: Right.

Maddow: And so the Auburn flows wouldn't ever really kick in, although the bureau was attempting to abide by them. I mean, they had plenty of water with which to do it without Auburn. They had plenty of water with which to meet those flows. And we said, under virtually all circumstances, we would not take water if doing so would cause the bureau to exceed or to invade the limits, to not be able to comply with the recreation and instream flow regime of D-1400.

It took a lot of doing for us to make that offer. A lot of hydrologic modeling runs, a lot of thinking, and we put that in our case early on. It was interesting because it kind of forced Sacramento County into some interesting thinking. There are some enormous ironies in this whole American River litigation. I told you that when Folsom South Canal was built, it included a gate structure, a turnout structure, at which East Bay was supposed to collect its water. There are five gates in that structure.

About a hundred yards up the canal from there, there is a seven-gate structure. And that structure was built for Sacramento County to take its water out of the Folsom South Canal. You see, the utility district was trying to contract for 150,000 acre-feet out of the Folsom South Canal. Sacramento County was trying to contract for 230,000 acre-feet to be taken out a hundred yards upstream from East Bay MUD's point of diversion.

Sacramento County's Issues

Maddow: How ironic for Sacramento County now to be leading the charge, arguing East Bay shouldn't be allowed to take the water out in a manner and at a place which would prevent it from going down the lower river when, in fact, they had been planning for many years to do the same thing. But we forced the issue with our physical solution, and I think those parts of the county that knew that there was still this water supply plan began to feel that maybe they needed to think in terms of something that would allow <u>them</u> to still continue to get some of the water they were looking for.

Sacramento County's identified needs for the water were for some agricultural uses in the southern part of the county, but they were also for some municipal and industrial uses in the very rapidly growing portions of the county to the south of the city of Sacramento. Elk Grove and Zone 40 and those areas. So the county added that for their physical solution, as well. I don't remember the details of it, but I remember that they put in a physical solution that would not in effect force East Bay totally off the river.

Mr. Somach came under serious fire, politically and in the press, as the lead lawyer for the county, for having countenanced the thought of anyone taking any water out of the river. Of course, he was countenancing the thought because that's what his client, at least part of his client, wanted to do.

Similarly, the city of Sacramento had designs on increasing its take of water from the American River. The city of Sacramento has two water treatment plants. One is on the American River, at H Street, about, oh, what is that? A mile and a half or two miles or maybe three miles, upstream of the confluence of the American and the Sacramento. Just upstream of the mouth of the American, really.

They have a second plant which is out on the Sacramento River. The H Street plant is the bigger plant, more modern plant, and the Sacramento River plant was the one that was more prone to problems related to the turbidity or, in particular, the pesticides and herbicides that come off the rice fields north of the city of Sacramento along the river. And that plant has been a troublesome one.

And so the city had these long-standing plans to double or even quadruple the size of its plant down along the reach of the American River from which people aren't supposed to be taking water under the political equation, mantra, that was developing as county people were trying to fend off East Bay.

The city of Sacramento serves water not only within the Sacramento city limits but it serves extensive areas outside the city limits, and its need to expand that plant was largely driven by growth outside the territorial boundaries of the city. One of the offshoots of that was at various and sundry times consideration of other forms of government in the Sacramento area. But the thought of extra-territorial water service by a government entity that the people who were being served had no voice in, was a concern to some people.

Well, I'm digressing on all of that. But the whole question of whether or not a physical solution was possible was aired quite early. It was quite troublesome. Because of that early airing, it tended to force the county to a position, or politically force them to a position where, more and more, they were finding themselves having to argue East Bay should be totally off the river and there shouldn't be any diversions

between Nimbus and the mouth of the river. That was troublesome to the Sacramento city water people. I know that sort of off the record because I knew a man who was one of the managers of that water utility, a very fine man who was very honest about his belief that higher quality water was available if he could take it off the American than if he had to get it someplace else.

But it was very clear that the lines were being drawn and East Bay was to be fought off, and if fighting them off meant nobody could take water out of the American, so be it.

LaBerge: Was part of it that East Bay was coming from down here?

Maddow: Absolutely. Absolutely. We were coming from a long way away, and we were trying to buy water that they considered to be part of their birthright. It's not called River City for nothing.

LaBerge: Right, sort of counties of origin kind of thinking?

Maddow: Very much that type of thinking. Not always expressed in terms of county of origin or area of origin or watershed of origin and legal protections, but the philosophy of it was certainly there. And there were lots of other elements of all of that. We were told that we ought to be taking water out of the Delta if we needed more water, and why do we need more water, anyway? I mean, there was always an argument about whether or not the utility district was trying to get more water in order to fuel growth.

There were arguments about such things as conservation and reclamation. Arguments about whether the Delta in particular was an alternative source. At one point in the early eighties, a group of twenty or so congressmen, primarily from southern California, signed a letter that was in effect saying that East Bay ought to come out of the Delta, and there were people within the political circles who were quite sure that some of the people from the Metropolitan Water District or other entities in southern California might have a hand in that happening. Remember, this was shortly after the defeat of the Peripheral

Canal. And remember where the votes lay from defeating the Peripheral Canal.[1] I mean, 94 percent voting against it in the East Bay service area. So, you know, there were lots of politics on sort of the broader scale that were afoot, as well.

Senator Greene's Commitment on S.B. 2458, 1986

Maddow: At one point in all of that, Assemblyman [Phillip] Isenberg and State Senator [Leroy] Greene from the Sacramento area had talked about trying to get the legislature to adopt new law that would in effect prevent East Bay from being able to take water off the American River. Senator Greene had a bill [looking through papers] that was introduced in 1986. It was Senate Bill 2458. I'll give you a copy of this.[2] Actually, I'll let you make copies of this because I'd kind of like to hang onto these, but it was in April of 1986. In effect, it was going to prohibit the construction by any public agency of facilities within or upstream of the Delta in order to transport high-quality American River water through or around the Delta. Instead, it should be allowed to flow downstream.

We got into some conversations with Senator Greene. I don't have a date on this document. I have always regretted that. But I know it was in early 1986 that I was in his office, along with his staff people, and as I recall, I had a utility district engineer with me. We struck what I thought was an appropriate compromise. It would have amended his legislation to say that [reading], "the East Bay Municipal Utility District may exercise rights under its contract for a water supply from the CVP, only to the extent that delivery of that water will not cause flows in

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[1]Proposition 9 (June 1982).

[2]See Appendix

the American to be diminished below the minimums of Decision 1400."[1]

I suggested that, and we had it typed up, and the senator signed it, and I signed it, and the bill was set to be heard in the senate. I guess it was called the Water Committee in those days. It was chaired by Senator [Ruben] Ayala of southern California. And his chief staff person was a man named Steve Macola. We reached this understanding. Senator Ayala had never been particularly happy with East Bay because he had been an advocate of the Peripheral Canal, and he thought that East Bay had not helped when it might have. And so he was prepared to take Senator Greene's bill to hearing.

When I saw Mr. Macola later on the day that the senator and I had signed this piece of paper, I said, "Steve, we're ready to go to hearing." He thought that they were going to deliver a blow to East Bay, I remember. I said, "Steve, we're ready to go to hearing. The senator and I have been talking this morning, and we reached agreement." And he said, "On what?" I showed him the piece of paper. He looked at it, and he shook his head, and he looked at me, and he said, "Poor Leroy. He won't know what's hit him."

And sure enough, other people, a staffperson from Assemblyman Isenberg's office and people from local political groups, et cetera, just started really berating Senator Greene that afternoon for having caved in to the utility district or whatever it is they thought he had done. But to his credit, he said, "I agreed. I signed off. Here's the piece of paper Maddow and I signed off." And he said, "I'm not going to go back on my word." So he pulled the bill. Rather than have it go to hearing and become some kind of embarrassment for him or me or somebody. Rather than force it to an issue, he pulled the bill. And he did so because he had given me his word on something, and he wouldn't go back on his word, and I give him a lot of credit. Some very nasty things were said to him by other people at about that time,

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[1]See Appendix.

and he endured a lot of criticism. And I was very impressed with the fact that he stuck by his word.

Senator Greene was an engineer by profession, as I recall. He had the ability to listen to what we were saying and to evaluate it as an engineer, and I think he thought that Decision 1400 gave the Sacramento area an enormous layer of protection that it hadn't previously had. And I know that he knew that Auburn Dam would probably never be built and therefore the protections of Decision 1400 had an ephemeral quality to them.

And as a result, he thought that by having East Bay, which did have the wherewithal to build something, by having East Bay commit to a measure that was intended to continue those D-1400 protections, he thought he was doing something that was to the distinct advantage of his constituency. And in hindsight, I believe he was right, and I think he made his decision on a fair basis. He didn't make his decision on a political basis. And politics were ruling the day in that era on these issues, so he suffered for it. He was not a pure politician.

Assemblyman Isenberg and Water Meters

Maddow: Assemblyman Isenberg, on the other hand, was unwilling to listen to some of the technical arguments. He knew that if he listened to them that we did a pretty good job. You see, Assemblyman Isenberg had been the mayor of Sacramento at the time that Sacramento was dealing with its needs to have a regional wastewater facility built. And the person who was probably more instrumental than just about anybody else in the way that plant ultimately got built was Jerry Gilbert, who was our general manager.

Jerry Gilbert and Phil Isenberg knew each other well and had a healthy, mutual respect, and I believe Isenberg knew that if it came down to an argument about the facts, Gilbert would probably

be able to win out. And so he never wanted to talk about the facts. He would just argue on the basis of politics.

One day he appeared at the Water Committee of the Commonwealth Club in San Francisco, and he talked that day about all the things that were wrong with East Bay's plans for water supply, for taking its water supply out of the American. And he talked purely on political and emotional grounds. I was there, and I asked him a question about something that the Sacramento board of supervisors had just done. They had approved a series of developments in the southern part of the county, developments for which Sacramento County was supposed to obtain water from Folsom South Canal and now had been unable to, and so what they were doing was approving these developments based upon mining groundwater from already seriously depleted aquifers, overdrafted aquifers.

And so I raised some questions of Assemblyman Isenberg about what was going on with regard to his own area's water supply planning, in contrast to what the utility district was trying to do. And of course I was able to bring in the fact that the city of Sacramento does not meter its water. I said, "How can you on the one hand say what you're saying with regard to East Bay and the reasonableness of its water supply program, when in fact the city and the county of Sacramento have these elements of their water supply programs which appear to raise the same kinds of questions?"

And in front of the whole Water Committee--there were maybe a hundred people there, maybe fifty people there--he said [speaking brusquely and quickly], "What do you expect from us, consistency?"

LaBerge: [chuckling]

Maddow: I've never forgotten that. I thought that was just great.

During that same period of time, the utility district was not just defending itself. We were trying to point out that

Sacramento County was doing some things that were questionable. In fact, in regard to a couple of the land-use planning decisions that were made, the utility district filed suit against the county, in particular with regard to an area called Zone 40, which was south of the city of Sacramento.

We attacked the adequacy of the environmental documentation that was done for some very large subdivisions, on the basis of inadequate attention to the water supply issues. And, in fact, those county decisions were in effect held up. We were successful in that litigation in at least causing them to go back and redo all the analysis of water supply issues and to come up with a whole new water supply planning approach that was more in keeping with what we believed to be the reasonable way of approaching water supply planning.

The tip of the iceberg of those arguments always had to do with the unmetered supply of the city of Sacramento. One day, one of those arguments had to be made in front of the Sacramento City Council, and I was the person who had the opportunity to make it. I mentioned Mr. Robie before. His wife, Lynn Robie, was at that time on the city council. And when I got up that day to talk about these issues, I, of course, used the absence of meters as the punchline of my presentation.

And there was quite a little discussion that followed after that, mainly berating me, of course. But it was interesting because Mrs. Robie would not mention the word "water meter." She talked about the "M" word.

LaBerge: [chuckling]

Maddow: The Robies know that it's a terrible mistake to not have meters in an urban setting. In fact, someone told me they have one on their house. When Ron Robie was director of the Department of Water Resources, he had one installed. I imagine, nobody reads it except maybe him [chuckling], but they understood what we were talking about. It is just politics.

But it is interesting to note that the city of Sacramento is a charter city. In most charter cities, Section I of the charter says something like "the name of this city shall be the city of Sacramento." My recollection is that Section I of the charter of the city of Sacramento says, "There will never be meters on residential hook-ups in the city of Sacramento."

LaBerge: You're kidding!

Maddow: It's in the city charter. I think it's in Section I. I knew all that once. But it's a long-standing issue.

LaBerge: Why would that be such a big deal?

Maddow: Well, you have to think about where the city is located and when charters were written and all of that. They're located at the intersection of two of the state's major rivers and pride themselves on being the River City and an abundant supply of water and all of that, and it harkens back to early times.

They are not alone in that. I believe there is a similar charter provision, or at least was at one time, at the city of Fresno. In Fresno, I believe meters are being installed in subdivisions, in new development, at this time. I don't know those details. And in areas served by the city of Sacramento but which are outside the city limits, I believe they're now installing meters. Clearly, meters are the way to go from the standpoint of efficient use of water and conservation and all that. I'm sure that the politicians and others in the city of Sacramento know that. It's just that it's kind of like [part of the arguments between]--

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Maddow: --the city and the utility district, because there was a fair amount of enmity and emotion at stake. The politicians up there were attacking the utility district for what it was doing, and the utility district felt that it was doing a careful job of being attentive to reasonableness and efficiency and conservation

and all those things, and didn't want to take these things lying down. And so when there were issues that arose with regard to land-use planning or resources planning from areas that were attacking the utility district, we occasionally pointed those things out. In some respects, you get some sort of short-term satisfaction out of all that. In some respects, we did help to move their planning in what I consider to be a more progressive direction.

In some respects, we just continued the polarization, and so I have mixed emotions about whether or not some of the things that we did were necessarily going to be in everybody's best interest in the long run. I don't think they really hurt. I think they did a good job of awakening people. But there was some additional polarization as a result of this. Not always the best way to resolve these kinds of things.

Art Littleworth and the Defense Team

LaBerge: Well, though, it sounds like you have a good relationship and admiration for some of your other opponents. I mean, when all these needs come up you say, "And he's a great guy, and he's a wonderful lawyer."

Maddow: Well, I truly believe that. The people who we faced in these cases were good people. I mean, they were attorneys representing clients. And just because you have to do battle with them doesn't mean you can't respect them. You're much better off if you do respect them. If you don't respect them, you're much more likely to make mistakes.

We tried throughout this whole thing to maintain a very high professional plane. Hiring Art Littleworth was key to that. There is no more professional lawyer I've ever known. There is no more of a gentleman in everything that he does. It pervaded our whole case. The case was huge. We had water quality issues,

fisheries issues, recreation issues. All of them enormously complicated, with a wide variety of expert testimony and reports and gosh only knows what else.

We actually used a six-attorney team from Art's firm. Each of the attorneys was backed by an associate. Art was backed by a young man named Eric Garner. We had a partner named Greg Wilkinson, who was just named one of California's outstanding lawyers last year, who recently got a unanimous supreme court decision on an Endangered Species Act case that made front page of the popular press. It was the main headline in the San Francisco Chronicle one day last week. And Ron Kohut was the third partner. Each of them was backed by an associate--Greg by Janice Weiss, and Ron by Laura (whose last name I have unfortunately forgotten at the moment). They were a wonderful team of people. We kind of split the case up into thirds, you know, so that nobody had an unmanageable portion.

We had a big team of people from the utility district: Bob Helwick essentially full-time, myself probably one-third time, and a flock of engineers and others. And the whole approach of that team was on a very high professional plane, by design, and it was all kind of just people trying to emulate Art Littleworth. Art's participation in the case raised the level of the debate to one that was a purer level of intellectual and scientific debate than it would have been had we had somebody in there who was more prone to get in there and just mix it up in a more typical case.

That's not to say we didn't fight hard and well. But the approach was a very professional approach. That's the way the utility district did things under Hal Raines and Jack Reilley, and it wasn't going to change under my watch. By hiring Art Littleworth I guaranteed that it wouldn't change. I think it raised the whole tone of the exercise.

Report of State Water Resources Control Board, 1987

Maddow: The state board staff produced this massive report in February of 1987. They took objections from the parties to the staff report. The board then conducted a hearing in the spring of 1987. It was about a ten-day hearing, at which the parties put out sort of summaries of the case that they had presented to the staff. We did it by panels. There was a limited direct and cross-examination. The board listened patiently and heard all these eminent witnesses.

And then the last day or two--I think it was maybe in addition to the ten days of hearings. I've forgotten now. But then the board said that it was going to take unsworn policy statements from anybody who wanted to come up and speak. There were quite a number of people who got up and spoke. Elected officials from down here and up there, a variety of people, and individuals, environmental organizations, et cetera. I think the very last person to speak was Andy Cohen.

LaBerge: Of your board.

Maddow: Who was later elected to the East Bay board. This was 1987, and Andy ran for the board and was elected in 1990. Andy was opposed to the American River project that the utility district was pursuing. He was very articulate, very forceful. He really caught the state board's attention, and the reason for it is not just the forcefulness and the articulateness of his statement. He was both forceful and articulate.

But when he came up to the rostrum, he was wearing an industrial strength knee brace. I don't know. I think he had had knee surgery or needed it or something. I don't remember the details. He was wearing shorts at the time, I remember. And it was a terrible effort for him to do this because this brace was just this massive appliance, and as he was approaching the rostrum, it was kind of like everything just stopped for a second because everybody was looking at this man. And then he certainly

had everybody's attention, and he gave probably the strongest statement that was ever made in the entire case before the state board of sort of the pure environmental position about the things that he saw wrong with East Bay's case. I always thought that was a remarkable incident in the whole process.

The board, however, had pretty much decided that it was going to stick with the referee's report that the staff had developed as a result of this long exercise. And in June they in fact completed the report and issued it. It in effect said East Bay's contract was not unreasonable. East Bay can use the water. They came up with an alternative to the physical solution that we had proposed that actually was a little more favorable to the utility district than what we had proposed, but it was based upon all this evidence that had come in subsequent to our preparation of our Exhibit 33.

The newspaper articles which I gave you earlier resulted from the issuance of the report back then. But, of course, that wasn't the end of anything because under Water Code Section 2000 what the board did was to adopt the report of referee, and send it back to the court!

Another Trial in Alameda County Superior Court

Maddow: A few months ensued. The board had to assemble the record because it had to send back the whole record to the court. But when everything got back down there to the court, it went back to Judge Bancroft. And on the first day we went in to see Judge Bancroft for a conference with him after his receiving the report, he announced that he was retiring. And, interestingly, someone asked him, "What are you going to do?" And he said that he was going to go to work for one of the firms that hires retired judges to be dispute resolvers, and he jokingly, I think, said, "I guess you can hire me" or something like that. Well, the state can't hire private judges. Can't do that. The state

is not allowed to do that. And so the two deputy attorneys general who were there had to say we simply couldn't do that, so it allowed us to gracefully move away from that moment that none of us were quite sure about.

But in any event, we then knew that we were going to have to go back and get a new judge. There was quite a swirl of activity about that point, trying to figure out where we were going to end up. Essentially, we went to see Judge Michael Ballachey. He was the presiding judge. And he thought about how he was going to go about assigning us to a new judge. I've forgotten all the details of the process, but to make a long story short, after a list of six judges was identified by Ballachey, we were soon assigned to Judge [Richard] Hodge, who at that time was out in the Hayward court.

We all trooped on out there one day, and he said, "Oh, so this is a water case." He said, "Well, I had a water case once. I learned a lot about hydrology." And we all kind of perked up. What he was talking about was a dispute between an uphill and downhill landowner about drainage. Two backyards, you know, kind of a thing? We all said, "Judge, this is a little bigger."

LaBerge: [chuckling]

Maddow: But he had a great spirit and good humor and was real anxious in getting into this. Frankly he started off by reading this report of referee and engaging in dialogue with the parties and all of that. I think from early on he decided that since the courts had held, both in *EDF I*--actually *EDF II*, I guess, and then subsequently we of course had the *Audubon* decision[1] come down, which was the first public trust decision. Since the courts had been saying that the state board and judges have concurrent jurisdiction, he said, "I can handle this case. Let's try it over again."

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[1]Audobon v. Superior Court (1983) 33 Cal. 3d 419.

So we had to get ready to try the case for the third time. The first time we tried it to the state board staff, the second time we tried it for the state board in the ten days of hearings, now we had to go try it for the judge. That was painful. Because we had been there, we had done that, and everybody kind of had to suck it up all over again.

LaBerge: And did the other side feel the same way?

Maddow: Oh, they hated the decision of the state board.

LaBerge: So they were happy.

Maddow: They filed reams of objections and exceptions to the state board's report, and they were anxious to get another shot. We tried to point out that it was unnecessary, and the judge said, "Ehgh!" He was ready to do it again. I shouldn't say it quite that way. He made a very thorough study, and he concluded that there were issues that he wanted to look at again. He wasn't satisfied with all the state board staff had done.

And so we started all over again, and we ended up with a lengthy trial and trooped in legions of experts for the much more formal type of proceeding than we had had at the state board. It all took place in the courthouse out at Hayward. We rented an apartment in a building down on A Street in Hayward and lodged five of the attorneys from the Littleworth firm there, and brought in a computer and had this huge table, like half the size of this, which was our work space. It was kind of an ideal location, but it was kind of like roughing it for those five attorneys. I really admired their courage in sticking it out. There wasn't room for all six of them, and fortunately Janice Weiss's grandmother lived in Hayward, so she stayed with her grandmother, and the other five stayed in the apartment.

A marriage resulted from this. I mean, Ron Kohut and Laura --I can't remember Laura's last name. But Ron Kohut and Laura were married some time after all of that. Actually, I guess it was maybe during that. So maybe that was a fortunate thing.

Daily Summaries and Expert Witnesses

Maddow: Judge Hodge had an interesting way of trying this case. Of course, there was a court reporter, but every day he asked each of the parties to provide him with a summary of what had happened the previous day. I can't remember if we actually provided them on a daily basis or a weekly basis, but we set up this computer system, for those days a very advanced computer system, in the apartment, and the role of the associates, one of their roles, was to produce these summaries. If the case was dealing with fisheries issues, there was one of the associates who was focusing on fisheries issues and that associate would produce that day's daily summary. We had these sort of daily rushes, you know, that we would have to produce.

We had expert witnesses from the East Coast on water quality. Dan Okun, one of the--I guess in French it would be *eminence gris*--one of the grey eminences, one of the real gurus of the subject, from the University of North Carolina. We always had to worry about that because if we were doing anything with Dan during basketball season, we'd always have to schedule him around [that]. He never wanted to miss a home North Carolina basketball game, and he didn't on our watch, anyway.

And we had a guy named Bob Harris, who was the man who did the work for EDF that resulted in all the publicity that accompanied the original enactment of the Safe Drinking Water Act. It was the analysis that resulted in somebody saying that by the time the water that becomes the water supply for the city of New Orleans reaches the city's water supply intakes, it has already been through the human kidney forty-eight times. That's not exactly what Harris's research showed, but they used Harris's research for those kinds of outrageous statements. Harris was a real leading exponent of drinking water quality.

We had really good people, including Don Kelley on fish. He was Mr. Salmon. He was the best salmon expert that anybody knew of, ably supported by a guy named Dave Dettman. We had a lot of

expert witnesses who were really good. The other side had good people, too. We think we pretty well outflanked them and beat them on the technical grounds. But Judge Hodge did give them a considerable amount of attention and sway when he reached his final decision, particularly with regard to recreational values in the river.

Lengthy trial. Weeks and weeks and weeks. Six weeks altogether of constant trial, as I recall, four days a week.

LaBerge: Did you go every day?

Maddow: I didn't go every day. I couldn't. Bob Helwick did. I could not. And that was largely because, you know, this was happening at a time when the utility district had a lot of stuff going on. And so I had to make the hard choices. I was actually more involved in some of the preparation stuff than I was in the presentation of the trial. I attended when I could.

Sacramento County, of course, and the environmental groups and the Department of Fish and Game were advocating for the fish, so they brought in a stuffed salmon, which the judge hung on the wall. Gorgeous fish. And we were advocating for water quality, and so we needed something like that, so one of our guys brought in a model of a molecule of something called a trihalomethane precursor. Trihalomethanes are produced through the combination of a water supply that has certain contaminants in it, particularly various organics, and chlorination to disinfect the water. One of these byproducts is something called a trihalomethane, which is carcinogenic.

And so we kind of focused on carcinogens in the water or at least the precursors to the formation of carcinogens in the water that we were being told that we should take in lieu of getting American River water, and we said, "We don't want any of that! And here's why!" And so somebody got up, and it was great, with this little sort of tinker toy model of a THM molecule. Well, Judge Hodge had that sitting right on his desk! And he used to play with it! So through the whole trial we had this sort of

irony of the fish looking over the whole proceeding, and the judge playing with the tinker toy THM.

And that's what the case came down to. Because the judge said those fishery issues have to be protected, and there's a lot more that we have to learn about this. Those recreation issues have to be protected, and there are probably more things we need to know about that, but by golly, drinking water counts, too, and so East Bay gets to take water. It's going to have some limits on its ability to take water. It can only take water when it's going to do so without any harm to the fish and without any harm to these recreation values.

Judge Hodge's Decision and Continuing Jurisdiction

Maddow: And he came up with a decision that was well over a hundred pages long. It included his version of a physical solution as well, with numbers that were higher than what the state board's physical solution had said, and that were higher than what we had proposed way back in our Exhibit 33. And, in fact, we thought they were much higher than was warranted by the evidence. But he kept continuing jurisdiction over the case, and he appointed a special master, a man named John Williams, from Carmel Valley, Carmel Highlands, California.

John was a hydrologist, and his role was to oversee continuing scientific work in an effort to in effect refine the physical solution. The judge knew that there would be times when his physical solution wouldn't let the utility district get as much water as it said it needed, and I think one point of the physical solution was to provide a safety valve so that we could come back to him and say, in times of need, you need to amend the physical solution or you need to make an exception.

I think he also kept continuing jurisdiction because he wasn't convinced of the fish data yet. We pretty well had salmon

and steelhead data covered, I think, and yet he thought that there was more that could be done. I think he thought that there was more that could be done with other species of fish, shad, for example, or maybe with some of the organisms in the lower parts of the food chain, et cetera. Those were the kinds of things that John Williams cared about and was good at and wanted to have more of a say in. So the judge wanted to leave the door open to in effect providing other forms or greater protections for the fish, as well.

So he really tried to do a balancing act. Both sides claimed victory. Rightly so. The utility district could take water, but not at the times it needed it most, and therefore was going to have to do something to accommodate that. The county could say and the environmental groups could say that they had in effect stymied East Bay's efforts to take water out of the lower American. And they thought that it was in essence going to block East Bay from ever being able to proceed, and East Bay said we can proceed.

And that was to be the beginning, then, of East Bay's next round of its water supply management planning, or one of the beginnings of the next round. Each side was hard-pressed when it came to deciding whether or not to appeal. The judge worked very hard to make that decision a hard one to appeal. And nobody appealed. He kept continuing jurisdiction. Technically, I guess that means the case is still in trial.

LaBerge: Still.

Maddow: He still maintains jurisdiction. Now, I don't know what's going on with that continuing jurisdiction at this point. I know that from the time of the judge's decision in early 1990, I guess that was, through the time I left East Bay, every year East Bay put up money for the special master, and periodically went down to see the judge. And I know that some of those activities continued after my departure because I've talked a little bit to Bob Helwick and one of the fellows on the engineering staff who was

the primary contact with Mr. Williams. But I don't know precisely what the status is today.

LaBerge: But you were allowed to take water from Folsom South Canal.

Maddow: Yes. With restrictions on when. In other words, we were allowed to take from the Folsom South Canal as long as certain flow levels were being maintained in the main portion of the river. We were limited in what we could do with the water. This was a drinking water quality case. We couldn't take this water and go sell it to somebody else to use for crops. We were supposed to use it within the utility district's service area. It wasn't supposed to be to help out people down in San Joaquin County, who felt they were going to get some water out of the utility district's contract.

In addition to the flow requirements, we could only take water out when certain flow requirements were met [reading]: ". . . 2000 cubic feet per second, October 15th through February, 3000 cubic feet per second in March through June, and 1750 cubic feet per second in July through October."

Plus, in addition to all the water that that meant was set aside and not available to us, an additional 60,000 acre-feet were supposed to be [reading] "maintained in reserve for release upon the recommendation of the Department of Fish and Game in response to specific fishery requirements."[1]

Now, what's interesting about all those provisions is that the Bureau of Reclamation owns Folsom Dam and Nimbus Dam, and they're the ones who control the valves, and their water rights were not before the state board, and so there's a serious question as to what this decision means with regard to the entity which controls the valves! And that's always been one of the crowning ironies in this case. East Bay started off this case by saying, "You're suing the wrong party because we don't have any water rights. It's the bureau. You're supposed to be suing

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[1]EDF v. EBMUD (1990) Superior Court, Alameda County, No. 425955.

them." Federal preemption. That's where we started with the demurrer that Judge Brunn sustained. And in many respects, we're still hung up on that point because the bureau is not a party. And the bureau is not bound to do anything with this.

On the other hand, this does hamstring other parties. Sacramento County can't now go and take water out of the canal, either, as far as I'm concerned. I don't know if they would agree with that. But because Sacramento County is so hamstrung, as I understand it, the utility district and the Sacramento Water Forum, which is a whole bunch of entities up there, including the county and the city and other stakeholders, they're now talking about a compromise, under which nobody would take any water out above the lower American.

Instead, they all would take water out further downstream, below the stretch where all the recreational and fisheries values are supposed to be concentrated, and then pipe it right back up where it came from. They would run a parallel pipe from sort of down towards the mouth of the river, by the I-5 bridge, back upstream to the water treatment plant that Sacramento has up there at H Street.

There is an enormous irony in that. And I think it's a reasonable approach. I commend the parties who have reached that compromise. But you have to realize how we got to that compromise. We got there because of all the political rhetoric that erupted as we were trying to deal with physical solutions that were being considered at the time we were at that state board reference proceeding. That polarized people into thinking East Bay has clout, et cetera, and that prevents the city and the county of Sacramento from being able to take water out anyplace upstream of where East Bay could be permitted to take it out.

Assessment of the Reference Procedure

LaBerge: What do you think about the reference procedure?

Maddow: It was very cumbersome. It had less flexibility than we would have liked. The judge sent the board twenty-one questions. The parties were allowed to kind of supplement with some additional questions. Even though, you know, we had to pay for it and that sort of thing, but the state board really didn't have all the resources it would have been nice to have had available for this type of proceeding.

On the other hand, it did allow the court to take advantage of the special knowledge and expertise of the state board. My biggest complaint is that when the state board finished its work, the court was able to ignore it.

LaBerge: Yes.

Maddow: And so my concern goes back to those provisions of *EDF II* and the *Audubon* decision, which say that there is concurrent jurisdiction. I think from the standpoint of California law, it would be better in the long run if there was more deference given to the actions of the state board, and in fact it would just be in the nature of mandamus review as opposed to trial de novo, when the matter comes back to the state board.

On the very first day of the trial before Judge Hodge, the very first subject that was discussed was concurrent jurisdiction. There was this delightful colloquy between Judge Hodge and Art Littleworth about the fact that when Justice [Allen] Broussard wrote the opinion of the supreme court in the *Audubon* case, the public trust case, he in essence said that the question of whether or not the courts and the state board have concurrent jurisdiction is a close call. If Justice Broussard had ruled the other way, we might have had a different result. We would not have had a six-week trial and all of that.

Last time I saw Justice Broussard, before he passed away, I bumped into him in Costco, and he vaguely recognized me because I had actually been before him when he was on the superior court bench. I told him who I was, and I told him about that colloquy between Littleworth and Hodge, and he kind of sparkled. He remembered that part of the decision. We really didn't talk much about it [smiling], but I remember he kind of lit up about that.

That's my principle criticism of the way the Section 2000 reference proceeding worked. It was inefficient. But while it was actually going on, it was cumbersome, and the state board knew that, too. It wasn't a real convenient way, real flexible way to do it. If the reference order had been written by a judge who was a little more engaged than Judge Bancroft was at that time, and that's not a criticism; it's just that he was not as engaged as he might have been had he not had the trial calendar he did when we were there before him. He had a terrible calendar, and so he was trying to fit us in. He didn't dig into our case as much as he might otherwise have done. Had he done so, we might have been able to get a more flexible and more workable, a more efficient reference order, but we didn't have one, and so we started off with a kind of inflexible and cumbersome mechanism, and it didn't get a lot better.

In terms of what the state board did to carry out its responsibilities, I give a lot of credit to that staff. I think they did a pretty good job. I think their lawyer, in particular, did a very good job. State Water Resources Control Board needs to be a better-funded and better-staffed organization than it is as California state government now works. In particular, it would need that if we get away from the concurrent jurisdiction stance that the current law had has us in.

Principle of Concurrent Jurisdiction

[Interview 5: May 23, 1997] ##

LaBerge: Well, the last time we were talking about the American River controversy. We sort of had wrapped it up except for a couple of comments about the State Water Resources Control Board.

Maddow: I wanted to talk for just a minute about the principle of concurrent jurisdiction. One of the things that the district endured, I think somewhat painfully, in the American River litigation was the fact that the case had to be tried a couple of times. As we discussed before, there was a reference to the state board by the superior court, and the state board spent a very long time and a great deal of money, half of which was district money, coming up with a very extensive report.

The report was then sent back to the court, and as I think I've told you before, when the court received it, we went through a change of judges. It ended up with Judge Hodge. And when the report came back to him, in effect the judge decided that he was going to hear the case all over again.

That led to an interesting colloquy on the very first day of the trial. Right at the beginning of the trial, the judge had received extensive papers about what his role was and what opportunities he had and that sort of thing, and there was quite a bit of discussion of the principle of concurrent jurisdiction. You see, when the state board had received the case from the superior court, it was because the court followed a provision of the Water Code which indicates that the state board can serve as a referee in regard to disputes over claims to water, and the board is supposed to be able to do so because of its particular expertise and knowledge.

Then, when its report came back to the court, the court had the ability to simply disregard it because the state doctrine of law is called concurrent jurisdiction. In other words, the court

and the board have equal opportunity to have a full-blown trial on the facts. If the doctrine of concurrent jurisdiction was not in effect, what would happen is the state board would make its decision, and then the matter would come back to the court, and the court would review the state board's decision under the standards of some form of administrative review. The court would review to see if the state board's decision was supported by substantial evidence in light of the whole record or some standard like that, but it would not have a trial de novo.

Well, in this case, it was pretty clear that trial de novo was the standard. On the first day of the trial, the judge, with almost his first comments, addressed that question. Art Littleworth, who was the district's counsel, quickly rose to his feet, and there was a fascinating colloquy between Art and the judge about the decision of the supreme court in 1983, the so-called Mono Lake decision, National Audubon Society.

In that case, Justice Broussard, who, of course, came out of Alameda County, had written the decision, and he had indicated in his decision that whether or not to give deference to the state board was--I think this is a quote--he said, "It was a close call." And he ruled in what for him was obviously a difficult decision that, in fact, concurrent jurisdiction would still apply in issues involving arguments about the public trust and matters like that.

Had he resolved that close call another way, we would not have had to try the case again before Judge Hodge after having tried it before the state board. And so I've often thought that that's an area of state law that some time in the future will probably be looked at again, when the courts or the legislature are attempting to determine how we can more efficiently get through disputes regarding competing and conflicting claims to use of water or how the public trust and public interest arguments are to be integrated with more traditional water rights doctrines.

From my perspective, it would be better to boost the authority and responsibility of the state board because they do, in fact, have a staff and considerable reservoir of expertise. Bad choice of words! A considerable amount of expertise. And, very frankly, the trial courts in this state are virtually overwhelmed even when they are at their best, and water cases take a long time. They're very hard. I think it would be better to leave more of that responsibility with the state board, and to fund the state board adequately so it could do the job.

But after years of state budget cutting, I believe the state board is understaffed and underfunded to be able to do this very well. I just think we might get better law, however, better decisions, better physical solutions, if the state board were better staffed and funded, better recognized as having that arbiter's role, and if their decisions were treated like administrative decisions that could only be overturned if there's an absence of substantial evidence or something like that.

I think trial de novo is an inefficient way to deal with these matters. And the best discussion of this problem that I've heard, I think, was that colloquy that's on the record from the first day of the trial, when Art Littleworth and Judge Hodge had their little discussion. So. Somebody someday will pick up on that and write a law review article or maybe draft a bill around it or something like that, but we'll just have to see how that plays out.

LaBerge: Was that Art Littleworth's opinion, too?

Maddow: Yes, I think it was. I believe at the time we all thought that the investment of some four years of effort and I've forgotten the amount of money, but it was in excess of a half a million dollars [$500,000] in district money, as I recall, at the state board was a considerable effort. Although none of us thought the state board's report of referee was perfect, we all thought--and I believe it's fair to say even some of the plaintiffs' attorneys thought--that the state board had done a reasonably thorough job

of at least outlining all the issues. There were some arguments about how they resolved some of the issues.

Everyone was a little unhappy about the decision, which probably means it was pretty good. But whatever it was, it's just kind of a footnote now because it just sits on people's desks or on people's bookshelves. But there was a lot of good work that went into it, in particular a lot of good fisheries work. You almost feel like it was wasted when you have to go back and do it again in that other kind of pressure cooker that you're in when you're in a superior court.

LaBerge: Well, I don't know if this is off the subject but, for instance, the National Labor Relations Board? Are their decisions taken differently than that of the State Water Resources?

Maddow: Yes. The general rule with administrative agencies is, in both state law and federal law, that if they have conducted their hearings and their proceedings in accordance with the statutes that they are supposed to follow, that they may only be overturned in the absence of substantial evidence or something like that, or if there was an arbitrary and capricious decision. The courts would review a decision like that almost in the way in which an appellate court would review a decision of a trial court.

The concurrent jurisdiction doctrine in California water law is sort of an aberration from what I would consider to be the norm in administrative law. The California system is not the only system that's around. In some other states, rather than have a water resources control board do it as an administrative matter, [they] have a whole separate system of law courts to deal with water matters. For example, in the state of Colorado. And that's an alternative. That's not the way it has been done in California. I don't know if anybody has ever really seriously looked at that. Perhaps the Governor's Commission on California Water Law did--I can't recall now. That was an effort chaired by former Chief Justice Donald Wright, and its report and several studies are available in libraries. The state board is a pretty

big organization. It's a pretty big state. Lots of complex issues.

I think the better way would be to give the state board some independence, sort of separate them from other parts of state government in the manner in which, for example, the Fair Political Practices Commission is separated from other parts of state government. Allow them to make decisions that are binding and not subject to concurrent jurisdiction.

Many of their decisions are of that nature, but it's just in these areas where there are certain types of disputes and these reference proceedings and things like that where you have this aberrational doctrine of concurrent jurisdiction that I think is troublesome. And, of course, we have it in the area of the doctrine of public trust. Public trust cases, I think, as the law has evolved, are looking more and more like water rights cases all the time. I would prefer to see the public trust doctrine expressly treated on a par with or as a part of the water rights process. Put it all before a body with authority and responsibility to resolve these disputes, and a body for which the decisions would receive more deference than they do now.

Public Trust Doctrine

LaBerge: You have referred to the public trust doctrine. Can you talk a little bit about it? What it is.

Maddow: I'm sure not an expert, and I probably should have done a little more homework if I had been thinking about that, but essentially the public trust doctrine is a doctrine that was determined by the supreme court in the *Audubon* case in 1983, to exist in parallel with the water rights doctrine. It says that there is in essence, as a part of the existence of the state, there is within the interests of the public this broad public trust

responsibility that deals with issues other than the proprietary interests in water. In other words, interests related to fisheries, wildlife, other interests which may not necessarily be the subject of a water right, are in fact entitled to protection by the courts. They can be the basis of a lawsuit attacking the use or method of use or point of diversion of a water supply.

In water rights law, there has always been a public interest element that has to be dealt with, in addition to the classic things about, you know, flow, et cetera, that you deal with in determining a water right. But the public interest component was never viewed as broadly by the state board or the courts as some people thought it should be. So in effect the parties in the Mono Lake case, the Audubon Society in particular, some of the other groups, brought in some very old principles--I guess it really goes all the way back to Roman law, this principle of this broader public trust that exists independent of the statutory law systems and which can, in fact, be a basis for a determination whether a particular use of water is appropriate or inappropriate.

If we do have another interview, let me do a little homework--it's been years since I've looked back at some of those fundamentals, and I just want to refresh my memory a little bit because I know some of the terminology I'm using is slightly off. But the key thing to realize about the public trust doctrine was until 1983 we didn't know we had it in water law. And starting in 1983 we suddenly discovered that any time you were dealing with conflict or competition among competing uses for water, in addition to dealing with the traditional elements of a water rights dispute, you would have to think about this other doctrine, this other set of legal principles, called the public trust.

It still isn't really easy to know where the public trust starts and stops, and water rights doctrine starts and stops, and how they are integrated. There are a number of law review articles and matters like that that you can find. You can find it discussed in a few cases, not very many yet. The legislature

has never really dabbled in the field. And so it still is fraught with some uncertainty. The state board attempts to deal with the public trust in its decisions, but very few court decisions have discussed it.

Art Littleworth and one of the other attorneys who worked on the American River litigation for East Bay, a man named Eric Garner, have written a book called California Water. It's published by the Solano Press. It's a paperbound book. It came out I think in 1995.[1]

LaBerge: I've looked at part of it. [Pulling out a copy]

Maddow: Yes, that's it. And they have a discussion in there of the public trust that is a pretty good primer.

Water Quality Issue

LaBerge: I don't think we talked about this. The issue of water quality and how that affected the outcome of the case. Had that been used before?

Maddow: Oh, yes. But it perhaps got taken to a little higher plane in the American River litigation than it had been. Fundamentally, the decision that the superior court made in the American River litigation says that there are very important issues related to recreation and fishery uses of the lower American River that have to be taken into account in determining whether East Bay MUD can implement its contract with the federal government for a water supply.

And weighed against those interests are the drinking water quality interests of the people of the East Bay. The utility

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[1]Arthur L. Littleworth and Eric L. Garner, California Water (Point Arena, CA: Solano Press Books, 1995).

district had, for a very long time, well, for its entire existence, had been particularly focused on source protection and source selection as the best guarantors of high-quality drinking water for its customers. And so when the utility district contracted with the federal government for a water supply, it did so with water quality being the principal determinant of where the water would be taken and how the contract would work. And, of course, water quality has been the driving factor in the siting and the design, construction, and operation of the utility district's Mokelumne system forever.

In the American River litigation, both before the state board and before the court, the principal dynamic was the interplay between the fisheries interests and the water quality interests. And the question that the judge and the state board really had to deal with was: Is there a way in which to maximize the high quality water availability for drinking water purposes while, at the same time, maximizing the availability of water for fisheries and recreation and other non-consumptive beneficial uses?

That's a hard dynamic. It's similar to the dynamic that you can read about in the newspapers here now with regard to one of my current clients, Contra Costa Water District, where there is a reservoir which is owned by the federal government, operated by the water district, which has a recreational presence that is operated by a park district.

LaBerge: Which is it?

Maddow: It's called Contra Loma Reservoir, out in Antioch. And for virtually the whole existence of the reservoir under the lease that the federal government entered into with the park district, there has been swimming in the reservoir. But the reservoir was always a backup reservoir. Drinking water use was not its primary purpose. That has changed over the years, as the population growth and the evolution of water use in the water district has taken place. And now the reservoir is used much more frequently for drinking water purposes.

It has kind of crossed the line in the minds of the Department of Health Services, which is the regulatory agency, and they are saying, "Oh, if you're using this reservoir as much as you say for water supply purposes, then there can be no swimming in that reservoir," because bodily contact is prohibited in a drinking water reservoir. There is state law, and there are state regulations on the subject.

Well, this is just starting to happen, and there are debates in public forums and in the newspapers about whether that recreational use--this is the backyard swimming hole for hundreds or thousands of people--whether that recreational use should hold sway over the drinking water quality and public health uses. And then the arguments start about, well, how many people have gotten sick, or how good is your data, or what do the studies really show, and these kinds of things. Those are hard debates, and they don't have easy, well-defined answers, wherever they are. Water utilities, from a policy perspective, err to the side of public health protection.

Well, that debate I talked about is kind of what we went through in the American River litigation. The utility district said, "We've got a need for high-quality water." The judge agreed. The judge based his decision on the fact that the utility district was contracting for a drinking water supply, and he said that was okay, and that the utility district could get that water for drinking water purposes, as long as enough water remained in the river to protect the recreation uses. And "Oh, by the way," he said, "this is drinking water."

So the utility district can't give some of it or sell some of it to people in San Joaquin County who have been wanting some of that same water for farming. This is drinking water. And if it isn't needed for drinking water, East Bay doesn't need to take it out of this place way upstream in the American River, where it has a higher quality. If they just need it for farming, they can take it out of the Delta. Or they can take it at another diversion point. That was sort of the theory of it.

So that dynamic between water quality and fisheries issues and recreation issues was a constant, and it was right at the heart of the case at all times. The utility district brought in some of the nation's leading water quality experts. Dr. Daniel Okun, from the University of North Carolina, who is sort of--the French would call him the *eminence gris* of water quality. A man named Dr. Bob Harris, who had been with the Environmental Defense Fund years ago and whose work regarding drinking water quality was very largely credited with the passage of the first version of the national Safe Drinking Water Act. And another man whose name has just flown from my head, who was the guy who came in and talked about a water quality parameter that had just been identified and hadn't been named yet, and we called it MX. [I think his name was Dr. Karim Ahmed.]

But we had very good water quality people and a tremendous amount of data. And the issue at that time ended up coming down to something, largely came down to something called trihalomethane formation potential, THMFP. That's what happens when you apply chlorine as a disinfectant to a water supply which contains organic materials. Depending upon what organic materials are in the water supply, the byproduct of disinfecting with chlorine or with some other disinfectants can be some form of a THM, a trihalomethane. And depending upon what you start with and which form of THM you end up with, you're going to get one form or another of a carcinogen, of a cancer-causing agent, or perhaps of a mutagenic agent. Carcinogenicity and mutagenicity. (I thought I forgot those words. Don't ask me to spell them.)

There's been a lot of science on this, and there is a lot of regulatory activity. We were trying these cases at a time when some of those regulations were still evolving, but fundamentally, the issues that we were dealing with were whether or not the utility district would continue to be able to obtain a water supply which was relatively low in trihalomethane formation potential and similarly low in salinity, turbidity, and some of the other things that can bring with them other forms of contaminants.

Delta water is higher in organics, salinity, turbidity, and all the other things, and so the fundamental for East Bay has always been, stay away from the Delta if you're looking for drinking water quality. I think I told you in an early interview about Governor [George] Pardee and when East Bay MUD was formed. He campaigned against an entity, a privately-owned utility that wanted to stay in business by keeping the utility district from being formed. They said, "We've got a good enough water supply from the Delta. We can perfect that, and you don't need this expensive Mokelumne supply." And Governor Pardee's statement to the newspapers was, "The Delta is where salt and sewerage meet." I think it was 1923.

And that's still a fundamental today. East Bay MUD's proposal now, with Sacramento County, to implement the American River Project by this new means that they have been negotiating between themselves, after having litigated for twenty years, it will take the water around the Delta so that East Bay can still say it's getting its water from as close as possible to the "snowflake." That's kind of what East Bay MUD's mantra has been for a very long time.[1]

That was a very long-winded answer to a good question.

Attorney General and the State Lands Commission

LaBerge: Going back to the American River, did the attorney general have any role in any of that litigation?

Maddow: Yes. Early on in the case, starting back in the seventies, the Department of Fish and Game sought to intervene in the case, and when it did so, it was frustrating to the utility district in a

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[1]As of 2001, EBMUD is planning to divert water from Freeport, on the Sacramento River, rather than from any diversion point on the American River or Folsom South Canal.

number of respects. But the California attorney general did come into the case on behalf of the Department of Fish and Game, which opposed the efforts of the utility district to implement its water supply contract.

LaBerge: Who was it at that time?

Maddow: Who was the attorney general at the time? Well, I have to think back. At one point, early on, when this was first going on, as I recall, it was Evelle Younger. And, as I recall there was a time when Jack Reilley was trying to meet him in Los Angeles, I think it was, and Jack's plane couldn't fly because of fog or something, and I remember he was inordinately frustrated by that. I think he ultimately did meet with the attorney general, and I know he was very frustrated by his inability to persuade them that they didn't belong in that case.

But they did come in, and were represented during much of the trial by a woman named Mary Hackenbracht. She was quite a good attorney. Another woman, deputy attorney general, named Sarah Russell, who lives up here in the Berkeley hills, and who later lost her home in the fire--she was also in the case for a while, as I recall.

Late in the process, another state agency, the State Lands Commission, also intervened and was represented by a third deputy attorney general named Matt Rodriguez, who is also a very good attorney. The State Lands Commission has jurisdiction over the bed and banks of streams, and they intervened in effect to deal with issues related to water levels and matters of that nature that primarily related to recreation in the lower American.

I always thought, without knowing, that one of the reasons why the State Lands Commission intervened is that its executive directors, first a woman named Claire Dedrick, who had been secretary for resources under Jerry Brown, and then Charlie Warren, who had been an assemblyman and was author of Energy Commission legislation and that sort of thing. He later was the Lands Commission executive officer. I frankly think that they

wanted to get into the case because there were issues that were of concern from an environmental standpoint that weren't necessarily related solely to bed and banks of streams but were close enough, and so they took a very active interest in the case there in the eighties. And Matt Rodriguez was a very capable attorney for the state in that matter.

With all due respect to the attorneys general, the deputies who were in the case, I would have to say that their role, while important, was not as significant as was the role of the other attorneys, in particular for Sacramento County and for the Environmental Defense Fund. Sacramento County was represented up through the end of 1983 by the county counsel, Mr. Lee Elam. And then, when the settlement of the case blew up, they turned to a law firm called McDonough Holland & Allen.

Martin McDonough had been one of the state's leading water lawyers. I think by that time Martin had retired or perhaps passed away. But in any event, when we first started the activities in the trial court, a man from that firm named Dennis DeCuir, represented them, and then Stuart Somach came into the case as soon as he could after having left the interior department solicitor's office. And Stuart was the lead lawyer on the case, ably backed up by a young man named Paul Simmons, who is an absolutely first-rate lawyer. They are now with a firm called DeCuir & Somach[1], which is a very active water law firm.

Tom Graff was the principal litigator for the EDF in the early years. But actually, as it came down to the trial, John Krautkraemer played a much more significant role. And John and Tom each did play a role at the time of the trial. John did most of the work. Tom was a significant force, of course. Tom is just a terrific guy and terrific lawyer. And John Krautkraemer I can say the same things about. John was killed in a tragic skiing accident here about three years ago. Otherwise, he would be one of those people who would be known on, I think, a national scale as an outstanding environmental lawyer, like Tom.

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[1]Firm is now called Somach, Simmons, and Dunn.

The attorney general's office was effective and omnipresent and wrote some good briefs and that sort of thing, but the lead role was really Sacramento County and John Krautkraemer in the litigation.

EBMUD Board Support

LaBerge: On the American River issue, what kind of board support did you have?

Maddow: Outstanding board support. And let me explain that briefly. I know time is short. As I mentioned to you, I became general counsel right at the beginning of January of 1984, and it was on my second or third day in the chair, so to speak, that we learned that the proposed settlement Jack Reilley and Bob Helwick had worked out had blown up. So as quickly as I could, I arranged for a closed session with the board of directors, in conjunction with a board meeting.

You have to remember that at that time the board consisted of sort of a six-person majority and one outspoken person who was frequently in the singular minority, and that was Helen Burke. I was very concerned about how we were going to maintain the fight that I could see was coming in that litigation, and do so without splitting the utility district down the middle in some way.

Keeping Options Open

Maddow: So the approach that I took, and I'm going to say this very carefully because I'm not going to reveal anything that was something that happened in a closed session. But I've said this much publicly in board meetings, and so I don't mind saying it here. The approach that I took was always to say that the role

that the lawyers were seeking to play in defending in that case was to keep the utility district's options open to the greatest degree possible. Options in terms of use of the American River contract for its supplemental water supply in some way.

We had unanimous support of the board in taking that approach. We had that unanimous support throughout the time that I was general counsel. I suspect that Bob Helwick still has it. The board's interests in the American River contract have taken on lots of different shapes and forms in the period of time since 1984, but the lawyers' role has been to keep the maximum number of options open. And there has been unanimous and consistent board support of that, to the best of my knowledge.

That doesn't mean there was always board unanimity in terms of whether to implement the contract or how to implement it. But keeping the options open was important to the board, and I think that we were quite successful in doing that. Not entirely successful. Quite successful.

Financial Support

Maddow: The other thing that is bound up in your question is financial support for that effort, and the board made the American River contract defense a high priority from a budgetary standpoint. That's not to say that we could do whatever we want, run amok, and all of that. We had to manage that effort, and did so. But we were told that in the long view, which is how you have to look at issues like this, that this was the most important thing the district had going on with regard to its future water supply. And so that long view was consistently taken by all of the directors for whom I worked during my tenure as general counsel.

And I think that's real important, because I've seen other agencies that have not had that. So I took a kind of a quiet pride in that because I worked very hard to make sure that the

board was understanding, at least as I saw it, in that long view. The case was not an inexpensive one to maintain. The law firm that represented the utility district was in Riverside, and so--

LaBerge: This is Art Littleworth?

Maddow: Art Littleworth's firm, Best, Best & Krieger. During the height of the trial, which went on over a two-month period, generally four days a week for two months, and then some, we actually had six lawyers from Riverside who were housed here. We rented a large apartment down on A Street in Hayward, where five of them lived, and then the sixth one lived with her grandmother, who fortunately lived not too far away. The case was tried in the superior court out in Hayward--not in Oakland.

One of the reasons why we had to have so many attorneys was that the judge insisted that each of the parties, both sides, if you will, each week would produce for him a summary of what they thought had happened in the trial that week, on a day-by-day basis. So we set up a computer center in that apartment. We divided our case into really three different parts, with Art taking the lead role in most of the legal issues, and then we had a fisheries team, and then we had a water quality team.

On each of those three teams, we had a partner and an associate, and the associate's responsibility, among other things, was to produce those summaries--almost transcripts--on a weekly basis. It's the only trial I've ever seen handled that way. It was a hard thing to do and added to the expense, but that's what the judge wanted, and so we had to do it.

We also had extensive teams of experts, water quality experts, whom I've mentioned; fisheries experts, quite a number of them. Chuck Hanson and Don Kelley and Dave Vogel and on and on. And we had recreation experts, a lot of very capable people. Many of those reports written in that litigation, either in the state board or in the court, are still, I'm sure, being used as valuable references by East Bay people, and by others, because it was first-class work.

I don't mean to belittle the work on the other side. They had good people doing good work also. I just think that the utility district had the stronger cast of experts and did a better job on paper with its experts. And I think that's one reason why we did as well as we did.

IV VARIOUS ISSUES AT EBMUD

Disinfection Process, 1997

LaBerge: Didn't EBMUD just recently change how they're treating the water?

Maddow: Yes.

LaBerge: It's new--to eliminate the problem of THMFP?

Maddow: To try and cope with the whole problem. East Bay MUD has changed its method of disinfection in some, eventually all--maybe it's all by now--of its water treatment plants. They're doing a couple of things. For safety purposes, they moved away from liquid chlorine and changed to some oxide of chlorine. This oxide has the same disinfectant capabilities as does chlorine, but it's more like using household bleach than it is like liquid chlorine, and East Bay MUD has its filter plants in neighborhoods, and so chemical-handling safety was an issue.

But the other thing East Bay MUD is doing is to change from using chlorine as its primary disinfectant, and to switch to chloramines. This is a different chemical altogether. With chloramines in particular, when they are used in combination with ozone as disinfectant, you have better ability to disinfect and not produce unwanted disinfection byproducts than if you use chlorine. And so the trend in the nation has been to move away from liquid chlorine for safety, and to switch to chloramine as a

disinfectant, and the utility district is consistent with those trends.

The utility district had some other problems related to a variety of aqueduct and distribution system difficulties that caused it also to want to switch to other means of disinfection, so I know there has been a very significant investment in new treatment plant technology and modernization. And it is largely to do away with disinfection byproducts such as trihalomethanes. Frankly, I have been real surprised to see water quality reports in the last few years which show East Bay is producing system-wide THM averages of around eighty, compared to the national standard of 100. I have not seen the data on a plant-by-plant basis, but I expect these numbers will drop with East Bay's new projects.

Chloramination alone doesn't entirely eliminate the water quality problems. After all, a significant part of the district's water supply comes in from high in the Sierra, gets piped in, but then is at least temporarily stored in San Pablo Reservoir or Upper San Leandro Reservoir or Briones Reservoir, and that will always add some organics. Therefore the quality of water coming out of those reservoirs is not quite as high as the quality of water that comes straight off the aqueduct and goes through a treatment plant and then into the distribution system.

That's why you find the best water quality--within the utility district, all water is of high quality. The highest quality water is pretty much in the central part of the district or in some parts of the eastern portion of the district, where the water that goes through the treatment plant comes right off the aqueduct. After Pardee, it's never been sitting in a lake.

Recreation and Watershed Protection

LaBerge: Yes. Well, you know, this brings us to another issue we haven't really discussed, and that's just the whole issue of recreation in the district.

Maddow: Jack Reilley probably talked about this in his book.

LaBerge: He did a little bit.

Maddow: He lived through a big part of that. As a part of its water quality ethic, the utility district was always very interested in watershed protection. When there began to be pressures to open up the reservoirs and their watersheds for public access for various recreation purposes, frankly at the beginning the utility district was not keen on that idea. It ended up with a variety of state legislation and other happenings that resulted in the district opening up some of its watersheds for public recreation purposes.

It is all done in a very controlled way. There are many forms of recreation that are not permitted. Body contact is not permitted in any district reservoir except Camanche, which is not a drinking water reservoir. There are strict limits on the activities that can go on around the perimeter of the watersheds. There once was a district operations manager named Gordon Laverty. Gordon always used to talk about trying to protect the *cordon sanitaire*. I used to tease him about that sometimes because I thought he was abusing a term that I think may have been created back in the days of influenza outbreaks of a pretty pandemic nature.

In any event, the principle of watershed protection and the dynamic with recreation was a strong force that East Bay had to deal with for quite some time. Now the utility district manages recreation very carefully. There is fishing and boating access to Pardee, which is drinking water. There has been a concession-

type operation up there that the utility district has operated for decades, or has had operated by concession contractors.

In the local watersheds, the biggest operation is at San Pablo Reservoir, which is in such a key location there, nestled right behind Berkeley and San Pablo and those areas. That's a very carefully planned and managed recreation activity. It produces a tremendous fishery because it's planted and I believe there are natural fish-spawning activities there, too. But primarily with planted fish. I read that it produces the greatest success rate of fish caught per angler hour of any reservoir in the Bay Area, and that's important to people who fish. San Pablo is also a concession-type recreation operation.

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Maddow: The utility district has two other local reservoirs where recreation is allowed. One is at Lafayette, where there is a district operation. At least by the time I left, it was still operated by district personnel, as opposed to by concessionaires.

Lake Chabot

Maddow: Then the third variation is at Lake Chabot down in the Castro Valley-San Leandro area, where the property was leased to the East Bay Regional Park District, which operates or has concessions for recreation activity there. Recreation out at the Lake Chabot area has been an interesting exercise. Actually, the Lake Chabot property was sold. A significant portion of it was originally owned by the army, which had a Nike base there, a Nike ground-to-air missile base back in the cold war, in the fifties.

The army property of some 235 acres, which the utility district recovered, eventually was sold to a community college district, which was going to build a college there, with all kinds of protections for water quality being built into the

property agreement. That property was then leased to the park district by the community college district, and in that lease, as well as a lease of some utility district property to the park district, there are all kinds of protections for drinking water quality.

I found that very interesting because I live right by Lake Chabot, and I know that it has not been used for drinking water since 1977. It's not connected to a filter plant. So it is basically an emergency supply of water, but it is still considered drinking water, so the very intense recreation activities out there do not include any body contact sports.

The other thing about recreation in the Lake Chabot area that is interesting is that Lake Chabot is a very old reservoir. It was built in the 1870s by Anthony Chabot as part of the original water supply development for the East Bay area. It's on San Leandro Creek. Upstream of San Leandro Creek, the utility district has built Upper San Leandro Reservoir. In between the two, along the course of the creek, there's a golf course called Willow Park, which is leased to the golf course operator by the park district. It's kind of a sublease under the lease from the utility district.

When the utility district has to release water from the upstream reservoir because of flood concerns, either due to local runoff or the water being brought in from Pardee, it doesn't take very much flow from Upper San Leandro before it has a significant impact on the golf course; it is a long, narrow golf course that snakes along the creek, and there's this ditch down through it. When the flow of water gets to about 120 cubic feet per second or greater, there can be problems at the golf course.

That spawned a great deal of litigation over the years by the golf course operator, who had signed lease documents which made him subject to that flooding operation. He had to take it, unfortunately for him, but that's the way his enterprise was created, and he knew it. That's the document he signed, and the

courts eventually validated all that. Extensive litigation, primarily handled by Bob Helwick.

So that recreation activity is one that's plopped right down there between those utility district reservoirs and has to function in a manner that is consistent with the operation of the reservoirs. When the reservoirs are operated in a way that is inconsistent with recreation, the golf course gets flooded. That sounds pretty tough, but I'm afraid that's the way that it works. If the golf course operator does what it is supposed to do to keep the ditch channel clean, the damage can be controlled, but probably not eliminated.

Recreation is an important part of the utility district's mission, but it is always secondary to drinking water supply. Drinking water supply has to come first. Recreation in an area that is as densely populated as the utility district service area--it's really difficult to not have a recreational presence when you have these magnificent watershed lands and these gorgeous lakes. The key is to be able to manage it.

I think to the utility district's credit, it has had very capable people managing those watershed activities, certainly for as long as I know, and there is a strong commitment to management in a way which will protect the water supply and yet provide the maximum public access and recreational opportunity that is consistent with that watershed water supply protection. I think they do a heck of a job.

Other Watersheds and Mountain Biking

Maddow: I think it will be interesting to watch over the next couple of years as the San Francisco watersheds in particular, on the Peninsula, are coming under enormous political and public pressure to open up in the same way that East Bay has opened up. They don't want to do it, I don't think.

LaBerge: No.

Maddow: From everything I've read. But they're eventually probably going to find themselves having to do so, and I think that they will probably try to model what East Bay has done with its program.

East Bay has not had one element of watershed recreation that some other agencies have had that could be very troublesome, and that's the constant battle with people who want to build mountain bike trails. Mountain bikes and motorcycles can produce erosion that's a terrible problem in drinking water reservoirs.

LaBerge: Like Mount Tam [Tamalpais]?

Maddow: Yes. Mount Tam. All those battles over there with mountain biking on Mount Tam pretty much have to do with the watershed of the Marin Municipal Water District. They have had to learn to cope with a difficult problem there. Watershed managers will tell you that, given their preference, they would not have either mountain bikes or any kind of motorcycles in their watershed. Over there I'm told they don't have motorcycles; they just have mountain bikes. But they do have problems with it, and it's a difficult management problem. My hat is off to the Marin Municipal Water District because they do a good job managing that frequently controversial issue. East Bay has not had to face that so much, at least to my knowledge. The Contra Costa Water District is now having to cope with it a little bit as it plans recreation for its new Los Vaqueros Reservoir, so that's an interesting little sidelight on recreation.

Grazing

Maddow: Grazing is another issue. Grazing is an important element in range land control and vegetation control and avoidance of fire. Fire can be a terrible thing in a watershed, for a water supply, for a drinking water supply. The aftermath of a fire is always

increased erosion. So well-managed grazing can be important as a watershed management tool because it can serve as a buffer to fire. There are some significant problems with it, which we are learning a great deal more about now as water managers are trying to cope with the relatively newly discovered problem in water supply. It's something called cryptosporidium. It's a little cyst. Actually, it's called an oocyst, one word.

If it gets into a water supply, it can be deadly. Something like 110 people in Milwaukee died in a crypto outbreak a few years ago, and 400,000 got sick. Las Vegas also had an outbreak and several deaths. It is now the most active regulatory area in the drinking water field. Crypto gets into drinking water through the feces of animals, and cattle in particular. Most particularly waste from calves, and therefore in grazing management it is important to keep the cattle away from the water and away from the water courses which can have direct access to the drinking water reservoir.

That's a tough management problem. Yet East Bay, again, has done, as I understand it, a pretty darn good job of managing for it. Crypto is a real tough issue and not an easy one to manage for. Giardia is another one. Giardia has been known a little longer. The cyst is bigger. It's not very big, but it's bigger. Up until the seventies, I never heard of giardia in all my years of camping and hiking and all that. It used to be you drank out of streams in the Sierra. You don't do that any more, do you? It's because of giardia. And it's largely because deer and raccoons carry them, and they're everywhere now.

So anyway, that's an element of recreation and watershed management that relates directly to the quality of the water that we serve, and we'll be hearing a great deal more about regulation and treatment techniques to deal with those things and other biological contaminants over the next few years.

Camanche Reservoir

LaBerge: When you were at the East Bay, what part did you have to play in any of this?

Maddow: In drinking water quality and in recreation?

LaBerge: In recreation. Were you litigating? Besides the golf course.

Maddow: The golf course litigation was one little sidelight. One of the areas we dealt with most was actually recreation at the district's Camanche Reservoir, which is not a drinking water reservoir. Camanche was the reservoir that was built in the big building program of the late fifties and early sixties, which allowed the utility district to expand its supply from 200 million gallons a day to 325 million gallons a day.

The idea is that Camanche, which is downstream of Pardee, is the reservoir in which the utility district can store water that belongs to people who have senior water rights, who are downstream of Camanche. And by having Camanche to store the water for those senior rights holders, the utility district can store more water in Pardee for use as drinking water.

When Camanche was built, the local counties, Amador, Calaveras, and San Joaquin, thought that it would be a wonderful recreation opportunity. And so the utility district agreed finally to the formation of what was called the Tri-County Park Board to actually manage recreation there. The park board leased the property from the utility district, and then it entered into concession agreements for the development and operation of recreation at the north and south side of Camanche.

It lasted for quite a while, and it was a failure. For a variety of reasons, largely thought by East Bay people to have been related either to undercapitalization or inadequate management capabilities on the part of the concessionaires. It was always sort of an extra responsibility of the counties. No

one really ran it. The utility district had to work through the pack board and the counties to try and keep a level of management there.

Eventually, the utility district had to go in and, with the cooperation and agreement of the counties, put the park board out of its misery and buy out those concessionaires and then go in and kind of straighten things out. Up through '93 I had a very large hand in all of that. Fortunately, none of it litigation. A lot of administrative work.

One of the triggering events to putting the park board out of its misery and the utility district buying out the concessionaires was that in 1979 through '81, the utility district decided that it would try and increase its power production. This was at a time when federal law had changed and made hydroelectric power at a facility like Pardee or Camanche much more valuable. And so a determination was made that a new power plant would be built at Camanche, and a third unit would be added to the two units of the existing Pardee power plant.

To do so, a license was required from the Federal Energy Regulatory Commission. The utility district had actually had a license, way back in the very early days of the predecessor, the Federal Power Commission. It was license number 567. And some very wise people at the utility district at some point were able to convince the Congress of the United States to pass a law that in essence cancelled that license and said the utility district was not going to be a federal power licensee for that Pardee power plant.

Well, in the late seventies and early eighties, the rush to build hydroelectric power brought back the federal grips. The utility district applied for a license for a new power project, a new plant at Camanche, and for the third unit at Pardee. The project license area, as defined in the maps that had to be included with the application, included the whole recreation area.

And so, to make a very long story short, a few years later, a young woman who worked for the staff of the commission in San Francisco was out on one of their annual licensee inspections, and she concluded that the two recreation areas in Camanche were absolutely awful, and she was absolutely right. It was that event, the federal regulatory agency coming in and saying, "Oh, my goodness," that kind of got the utility district galvanized to do something about recreation activity there.

I don't know exactly what the status of it is now, but I believe the utility district went in, spent a fair amount of money, cleaned up the recreation areas. I imagine that there are new licensees or concessionaires in there, operating the recreation activity, and I would suspect it is far improved over what it was.

Contract with Park District for Peace Officers

Maddow: That was a major activity that we were involved in in the legal department for quite some time. Other recreation area activities that we got involved in included the time when the utility district decided it wanted to create a police force. We wrote the legislation and helped to do the groundwork that led to the establishment and operation of the utility district police force. It was something that none of us in the legal department thought was a good idea, I'm happy to say, because the utility district eventually agreed with us and did away with it.

LaBerge: For just the recreation areas?

Maddow: For the recreation areas. The motivation was right, but somehow the whole idea of the utility district having peace officers to manage--having those people be a part of the watershed recreation activity was never a good fit. And so the utility district transferred much of that responsibility and some of those people --transferred is the wrong word--to the park district. Then the

utility district contracted with the park district, which had an existing police force, and the park district does much of that work for the utility district now. They were in many respects better equipped for it.

But the legal department--I had a role in that. Fortunately, no litigation, except an occasional lawsuit to defend. We never had, like, police brutality or something, but we did have occasional minor tort claim activity that related to people with various complaints about the police force, but that was a very minor level of activity.

There were occasionally recreation area activities that did result in damage cases and that sort of thing. We did have one large wrongful death claim involving a man who fell from a bicycle in one of the recreation areas. But no big cosmic cases or major issues that I can recall. More administrative activities that could keep you quite busy. Rates and charges issues exist over there. How one goes about setting up permit systems and controlling a variety of access activities. A fair amount of interaction with the local land-use planning jurisdictions, in particular with regard to such things as road access and things like that.

Pump-back Scheme for Camanche, 1988

LaBerge: You wanted to talk about the [1988] pump-back scheme at Camanche.

Maddow: I will. It's a water rights matter, and I think it's a fascinating one from a number of perspectives. This was during the drought of the late eighties. The utility district was facing the prospects of declining available supply and rationing, et cetera, down in the service area, and so a variety of alternatives was investigated for how to supplement the district's water supply. In the drought of the seventies, the

supplement was something we talked about before, where the district pumped water out of the Middle River.

In the eighties, an effort was made to take a different approach to that. The theory was that the quality of water needed for the uses downstream of Camanche was probably significantly less than drinking water quality; perhaps, in the emergency circumstance that the district was in, one way to do it might be to pump water out of the Delta, water that the district would get a right to by virtue of making special arrangements with the bureau to use some American River water that would be released from Folsom, run down the American, down the Sacramento, into the Delta. The district would pick it up someplace and then figure out a way to get it into Camanche.

The idea was one that at the beginning, when everyone was enthusiastic about it, was a high-level management decision and plan and all this. Then, later on, when it began to run into some rough spots, it became known as the Stein Plan, after Dick Stein, who was a hydrographer down there, who really took this idea and showed how it could be made to work from a hydrographic and hydrologic standpoint. As I say, later on it became Stein's idea, when it looked like it was going to have trouble [chuckling] with regulatory agencies. Dick is a good friend, and I know he'll laugh when he hears that I've said that. It's not meant in a critical way at all. It's just kind of the way things work in bureaucracies. Success has many parents.

Anyway, the idea was that the utility district would build a pump station which would pump water into one of the aqueducts. The water would be pumped backwards. The aqueducts run from east to west. We said you could pick up Delta water and run it backwards and dump it into Camanche Reservoir, where it could be used to satisfy the downstream needs, thereby preserving more of the Pardee water for drinking water purposes.

In order to do so, we needed to file a petition with the State Water Resources Control Board that would allow us to change points of diversion and methods of diversion and purposes of use

and places of use and that sort of thing for some of the water under a variety of rights. To make a long story short, it resulted in a fairly lengthy water rights hearing. Bob Helwick really carried the load. He is a very good water rights lawyer. I had a bit of a role in it, but Bob did the majority of the work. I think I perhaps made an opening statement or maybe a closing statement. Bob did all the work.

We were opposed in that hearing by San Joaquin County and by the city of Lodi. The city of Lodi has a groundwater system for its drinking water supply. Of course, they're right on the Mokelumne, and they have this old, old right, as against East Bay, which they're very careful to guard. There are circumstances under which East Bay might have to supply water to the city of Lodi if in fact it's determined that the operations of the district's facilities have resulted in a decline in the groundwater that's available to the city. So drinking water quality and quantity issues are very important to that city.

In any event, the upshot of the lengthy hearing was that the State Water Resources Control Board could only permit the utility district to go forward with what it was proposing if it could find that the changes the district was seeking to make in water rights and their operation would be without injury to any other lawful user of water. The board eventually found that there would be a very slight increase in the trihalomethane, the THMFP, for the water drawn from Lodi's wells.

Now, with THMs, the regulatory standard that is the critical standard is one hundred parts per billion, and the water district was producing water--in those days it was probably around seventy parts per billion. Maybe fifty to seventy, something like that. Lodi's groundwater was at something like one or two parts per billion, and the evidence was that, at worst, the operation that the utility district was proposing with the pump-back of Delta water, would have raised their THM level from two to six, as I recall. And the board found that that was a sufficient injury so that it had to disallow the permit that the utility district had sought.

I understand that. "Without injury" is the applicable legal standard. I think that under the circumstances the board had a number of other options. It did not have to apply that standard as literally as it did. What's interesting today is that there are legislative proposals around to free up the transfer of water between water rights holders or between basins or what have you. And there has been quite an extensive effort to write a model water transfer package. A professor named Brian Gray from over at Hastings Law School has been the principal author, and it's being sponsored by the Bank of America and the [California] Business Roundtable and the Farm Bureau and people like that. It's quite a good piece of work.

One of the things that it would do would be to change that legal standard from "without injury" to "without significant injury." I think that if that legislation or something like it should be enacted, and if the Stein Plan were proposed again, the utility district could probably get it permitted and could probably use something like that pump-back scheme in an effort to stretch its available water supplies during a drought period.

I don't know whether that's the plan the utility district would hit on in a repeat of '88, but that is the one it tried back then. It was a good hearing because all parties were very well represented. It was the first time we had to deal at great length with the Committee to Save the Mokelumne, which is an organization that grew up up in Lodi, around a man named Bill Jennings and his lawyer, Mike Jackson. And that organization has been after the utility district ever since. They're the ones who really took the utility district on over the Penn Mine in more recent years. But that's where we first really encountered them in a significant way.

But the case was well litigated. It was a fun hearing in the sense that we didn't have a lot of extraneous stuff. You really got to focus on the issues, and it was being done in a very professional way. I think all the people who were in it came out of it feeling as though they had given it their level best shot. We were disappointed because we didn't prevail, but

we gave it a great shot, and we did a lot of scientific work that I think the utility district can still use as it thinks about its various and sundry options with how to supplement its water supply in the long term, in the future.

Scientific Background from EBMUD Experts

LaBerge: That's a question I have for you: where did you pick up all the science you had to know for this?

Maddow: By hanging around with these engineers. The only way you can learn it is by a kind of osmosis, if you haven't studied it. If I had been a civil engineer by education or hydrology or hydrography student or something like that, it would have been great. But basically I just worked with these people and listened to them and did an enormous amount of reading. And I was fortunate in that the utility district's technical staff is a very good staff. They are not only people who know this stuff, but they know how to explain it, including to people like me, to whom it sometimes doesn't come so quickly.

After a while, when you work with people like Jon Myers and Kip Spragens and Dick Stein--I mean, those people are just--they're really good. And Orrin Harder and Jack Reilley. You know, people from the earlier periods. One of the things that I always liked about working with the utility district's professional staff was that we could always count on them to spend the time necessary to make sure the lawyers knew what these people were talking about. Even if all the lawyers were doing would be to sort of proverbially open the door so we can shove the expert through. Sometimes they knew that we were going to have to get into the dialogue, and so we were always able to work in a very cooperative spirit and in a friendly spirit. But most importantly, it was on a very high professional plane. That's part of why East Bay MUD has been as well recognized a utility as

it has been for so long. It's high-quality people who work on a very high professional level.

If you go around the state in particular, but the country, you could find lots and lots of people who did at least part of their training at East Bay MUD, who really learned what it meant to take their professional knowledge and their wisdom and apply it in a very professional way. That's the part that I think is different in East Bay MUD. It's that gloss of professionalism that is a part of the ethic of the organization. And that's what kind of sets it apart, I think. And it has for a very long time.

Value of Historical Records in Water Rights Issues

LaBerge: In fact, Jon Myers is really interested in the oral histories because of water rights issues.

Maddow: Jon Myers understands something that not very many people at the utility district have understood over the years. Many are interested; not many have understood it as well as Jon. Your water rights are only as good as your understanding of your records. A water right is called a usufructary right. You either use it, or you lose it. It is only as good as you make use of it. And the only way you can demonstrate your use of it is through those records. And so Jon and I have had many conversations over the years about the significance of maintaining good hydrologic records. Nobody has anything like the store of records the utility district has for the Mokelumne River.

There are other rivers, both larger and smaller than the Mokelumne, where somebody called the water master has been given the responsibility of keeping all the records. Few water masters have records that are as encyclopedic as the utility district's have been. Sometimes Jon gets angry at the fact that in more recent years, in the last twenty years, the utility district has

backed off on some of its record-keeping functions. It used to have hydrographers who--

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Maddow: The hydrographers in Lodi kept records on the crop use and the other water use details by farmers who have rights that are senior to the utility district. That's very important because the utility district has an obligation to get water to those people, and it has an obligation to get water to--the losses, as the water moves down the river, come out of the utility district's hide. So as their uses change, in particular as they diminish, the utility district needs to know about that so that it can make sure it is sending the right amount of water down the river, not a drop too much, if it can help it.

And that's why Jon is so hot on the records and all of that and the understanding of how those water rights came to be and their care and feeding. He's a real master at that. When the utility district stole him away from the railroad industry, it did a good thing.

Kip Spragens isn't quite as visible in a lot of these things as Jon, but if anything, in some respects Kip's knowledge is deeper than Jon's, and that's not a slight to Jon; it's just praise of Kip. They have another young person there, Lena Tam, a young woman who has been there a few years now. Lena has not their encyclopedic knowledge of it, but she is an absolute master at taking everything they've got and computerizing it and being able to manipulate it through the computer. Those talents are absolutely critical to somebody who has surface water rights of the type that the utility district has. And that staff is first-rate; there are a number of others as well.

The Penn Mine

[Interview 6: June 18, 1997] ##

Maddow: The Penn Mine is a fascinating subject, and there are a couple of things I'll need to read to really be sure that I am up on it. But just in a nutshell, let me say that it's a great example of how doing the right thing can sometimes come back to haunt you. Because the utility district and the Regional Water Quality Control Board for the Central Valley tried very hard to clean up somebody else's mess. Or, better yet, to take steps to make sure that a mess left by somebody else didn't foul up the waters of the state.

In so doing, they took some actions that subsequently have been found by the courts to have been improper or illegal, and as a result they are now having to go in and spend vast sums of money to clean up this mess that somebody else left. And it's unfortunate, but it sometimes happens that way. I just think it's unfortunate that the utility district ran into it. A lot of litigation. Bitterly litigated. Some results that sometimes struck me as being a little bit stretched, but we'll talk about it more in detail later.

LaBerge: Okay.

Historical Background

LaBerge: Okay. When we ended the last time, we decided we would just check off some of these last issues. One was Penn Mine. Why don't you tell me about that?

Maddow: It's a tremendous story that I'm going to tell you in the thumbnail version. On the south bank of the Mokelumne, between Pardee and Camanche, there is an old mine commonly known as the

Penn or the New Penn Mine. It was a source of minerals that were used in the munitions industry in every war from the Civil War through the Korean War, and it would have been used in the Vietnam War except for the fact that by that time the water quality laws of the state had started to come into effect.

When the utility district purchased property for Camanche Reservoir, it ended up having to acquire some property which had previously belonged to the Penn Mine, portions of the mine property closer to the river.

Court Finds No Responsibility on Part of War Department

LaBerge: Penn Mine belonged to the government?

Maddow: No. Penn Mine belonged to a private company. There is a government tie because in World War II the mine had been shut down. It had been shut down after World War I, some time after World War I. But it was reopened in World War II and was in fact operated by a company that I believe was called Eagle Shawmut. They got started as a result of a loan from the War Department. In fact, the War Department was the operator of the mine through Eagle Shawmut for a period of time during the war. And something on the order of 10,000 tons, I think, of zinc concentrate, or something like that, came out of the mine for the munitions business.

To skip ahead a little bit, much, much later, in the late eighties and into the nineties, the utility district sought to establish that some of the contamination of the site and of the Mokelumne was as a result of the government's ownership and operation, or at least having a stake in the ownership and operation of the mine, and that therefore the federal government ought to participate in the cleanup.

That led to some very significant litigation, in which the utility district was unsuccessful, as I understand it. That has been concluded since I left. But the theory was that under modern pollution prevention and contamination law, CERCLA [Comprehensive Environmental Response, Compensation and Liability Act] being the principal law, I think, those who were responsible for the pollution are forever responsible.

So the utility district took the position that the old War Department's financial arm that got the mine up and running there in World War II--it was an owner-operator; it had an owner-operator relationship. There was a case coming out of, I think, North Carolina where this same government entity had funded the construction of a mill to produce, as I recall, cord that was used in parachutes or some such thing in World War II. Eventually, in that case, a federal court determined that the United States was the owner-operator of the facility and therefore had continuing responsibility.

In the Penn Mine case, the federal court reached a different conclusion, which means that the old War Department interests will not result in the United States having to pay a cost of that cleanup. That manifested itself in a piece of litigation that I think was called *East Bay MUD v. Department of Commerce*, because the United States Department of Commerce was ultimately the part of the U.S. Government that succeeded to the interests of whatever that War Department entity was that had financed it.

Anyway, the mine was in private ownership. Pretty busy place, whenever there was a war on or people thought there was gold. Huge mine. I mean, there are something like thirteen miles of shafts and adits under the mine. Essentially, when it shut down for the last time, it was abandoned, and what was left was a series of slag piles and tailings and open adits and mineral-laden material, and a horrible potential water-quality problem.

I think it was in the forties, when the mine was in operation, that there was some kind of a smelting operation on

the north bank of the river. They had a wooden flume that ran across the river and carried material from the mine or perhaps wastes from the mine. I'm not really sure. There's a story that I never really tracked down, and it was to the effect that the flume broke, and as a result, some of the mine material or waste actually got into the river; as an old time East Bay MUD person recorded at one point, in a note that I saw someplace, when the waste spilled, it killed all the fish from the mine to the Delta. So the potential water quality issues related to the heavy metals in this mine were pretty serious.

EBMUD Acquires Land for Camanche Reservoir

Maddow: When the utility district went up to buy the property for Camanche, the ultimate decision was to build Camanche as we now know it, of about 430,000 acre-feet of storage capacity. Alternatives which were eliminated included a smaller Camanche plus one or two smaller dams upstream from Pardee. When full, Camanche would inundate a portion of the old Penn Mine property. That's what the utility district had to buy--that portion which would have been inundated. It included, as I recall, the strip of land along the river. I want to say 180 acres, some number like that. It included some of the old slag heaps where materials that came out of the smelter that looked like giant black bathtubs of crystallized material--there was a huge pile of that. And then there were tailings and things like that. And there was an old mill, and there was some other building.

But the utility district did not acquire the evaporation ponds, which were the areas where there was thought to be perhaps the most serious of the potential contamination problems, as I recall. In the 1970s, during the drought, Camanche, of course, was way down, and there was some incident involving heavy metals and problems with regard to fish in the river downstream from Camanche. It was in the river, not in the reservoir. There was a concern that, at the conclusion of the drought, particularly if

you got a real wet period of time, water flowing from above the mine, across the mine property, down through two creeks that crossed it, would reach the Mokelumne, reach Camanche, and erode down into those sediments and those waste piles and could cause a more significant heavy metals contamination problem.

Attempts to Contain Mine Wastes

Maddow: So in 1977 and really in a big way in 1978, the utility district, in very close cooperation with the Regional Water Quality Control Board for the Central Valley and with, I guess I would call it, sort of grudging cooperation on the part of the California Department of Fish and Game, went in to try to engineer a containment scheme to keep the mine wastes from reaching the Mokelumne, reaching Camanche or the river. At first the regional board was pushing East Bay to do something--eventually the utility district was successful in getting the state agencies to agree to work together.

At the heart of the scheme was the idea that there should be ditches built above and around the old mine site so that clean water, rainfall, that was falling in the uphill areas would flow as surface water runoff, be intercepted by the ditches, and reach the river without ever going into the contaminated areas. That was to be the heart of the system. That part of the system was to be constructed by the Regional Water Quality Control Board. And in candor and for reasons that I'm not sure I ever knew, or if I did I shouldn't try and comment on them because I don't know about them from a technical standpoint, but that part of the system was never really completed. The regional board either couldn't do it, didn't do it, or didn't do it right. Something along those lines. And the result was that there was more water reaching the mine area than should have happened for this system to have fully worked as it had been conceived.

The other principal element of the system was something called Mine Run Dam. There were two creeks that ran down into and through the mine property. One was called Hinkley Run, and one was called Mine Run. At the base of the mine property, in the area that the utility district had acquired, they kind of came together. The utility district built a small dam there. The idea was to contain the runoff from precipitation that fell on the mine, and to the extent that there was any leaching coming out of the mine, out of the soil, it would be contained there.

There was this series of old evaporation ponds that had been left when the mine was abandoned, and those were kind of scooped out and cleaned up a bit, in hopes that they would continue to function as evaporation ponds, and Mine Run Dam down there would be sort of a last resort. The idea was to have it catch the runoff from the mine, and then eventually there would be a process of evaporation. Mine Run Dam was built so that it could have water on both sides of it because at its high-water mark, Camanche would be inundating the downstream side of Mine Run Dam, and this impoundment of water which had crossed the mine property and picked up mine wastes would be on the upstream side of that dam.

It worked reasonably well, not perfectly. The principal problem being the failure to complete the ditches. This system was not an easy thing to do. Nobody wanted to do it, but the utility district ended up doing it, on the theory that nobody else was going to come to the aid of the utility district. Nobody else was going to step up to try and clean up this problem. It was not a problem of the utility district's making, but somebody had to in essence serve as the Good Samaritan. And that's really what the district did.

There's no question but that it did so under threat of some sort of regulatory action, principally by the Regional Water Quality Control Board. But instead of simply saying, "Throw down the gauntlet and let's get into it," the utility district's approach was to try and work with the regional board and Fish and Game to come up with a solution.

The regional board has, I don't know, between the Central Valley board and the other boards there are probably 10,000 abandoned mines in California. There haven't been very many of them which have created problems of this magnitude. Iron Mountain is the other one that gets all the attention. It's up near Lake Shasta.

Involvement of Regional Water Quality Control Board and Department of Fish and Game

Maddow: It's pretty clear that the water board grudgingly came to the idea that it ought to assist in all of this, but when it did so, it really did get into it. And to the credit of that regional board and the people who worked on it, when they made the decision to become a co-Good Samaritan, they stuck with it right through the end, even though they got very badly beaten up by it and as a result of it over the years.

LaBerge: What was your involvement?

Maddow: At the time that we were trying to figure out a way to solve the problem, to address the problem, I was the lawyer who was on point, working very closely with the man who at that time was the district's director of engineering, a man named Walt Anton, who is dead now. Walt had the technical idea, and my role was to work with the regional board staff and lawyers to try and make sure we could put together something that would be consistent with California law and which would make institutional sense for both entities. Much later federal law became very important regarding this effort, but back at the beginning state law was the focus.

One of the things that I was insistent on was that the utility district do everything that it could, including just pressuring the regional board, to get the Department of Fish and Game to sign off because you have to remember that, on the

downstream side of Camanche Reservoir, there's a fish hatchery that's operated by the Department of Fish and Game as one of the mitigations for the utility district building Camanche Reservoir. And that fish hatchery in a sense was kind of the canary in the coal mine. If there were going to be water quality problems stemming from the Penn Mine, they would probably first be realized in that sensitive environment of the fish hatchery. It had eggs and fry and those kinds of things.

So I thought it would be important to have Fish and Game not necessarily as a co-Good Samaritan but at least acknowledging what was happening and getting them to sign off in recognition of what we were trying to do. I viewed what we did as being moderately successful in the sense that institutionally at the time it worked. We worked very closely with the executive director of the regional board, a man named Jim Robertson, who will ever remain in my memory because in his office he had three things on his wall: his college diploma, his registration as a professional engineer, and in between the two of them he had a photostat of his birth certificate, with his two little feet! I always thought that he understood the important things in his life!

But the man at the regional board who really made it go was named Bill Crooks, who was assistant executive director, and later became the executive director. And we worked very closely with a lawyer who was from the state board legal staff but was assigned to that regional board. His name was Buck Taylor. Buck, of course, was the lawyer for the state board many years later, on the American River stuff.

LaBerge: Okay. That name was familiar. Maybe you mentioned him.

Maddow: Yes, I think I probably did. I have a very high regard for Buck. I think he's an excellent lawyer. He's one of the really good people working for the state in water resources matters.

In any event, the district put together this project. Tom Linville, who we talked about before, who is now assistant

general manager of Contra Costa Water District, was the project engineer. He has a photograph up on the wall of his office now, something that's called "Linville Dam." That's what we jokingly called it. And that picture says that the lake behind it is known as "Lake Maddow." (I don't want that to be my claim to fame!) So we kind of went way back with all of that.

The problems really, however, became serious ones and much more expensive ones for the utility district in the eighties. An organization called the Committee to Save the Mokelumne became very involved in activities concerning the utility district on the Mokelumne and in general. They became involved at a number of different places at times. When I talked before about I jokingly referred to as the Stein Plan, the pump-back scheme in the eighties, the Committee to Save the Mokelumne became very involved in all of that.

But they got really interested in Penn Mine. Mr. Bill Jennings, who was and I suspect still is the main person in that organization, believed that the utility district had made a terrible mistake when it built Pardee because Pardee intercepted flows that would otherwise have diluted the mine wastes. The mine was already there when Pardee was built. And he thinks the utility made a worse mistake when it built Camanche, which he at various times characterized as a heavy metal sink for what's coming off the mine, et cetera.

He and his organization, with the legal assistance of the Sierra Club Legal Defense Fund, put together quite a significant effort, primarily under federal law, to in effect get a higher degree of regulation of Mine Run Dam and the old Penn Mine solution, and to force the district and the regional board to do what under some other circumstances might be almost like a Superfund cleanup. It was not done under Superfund, but it almost has some of those trappings.

Maddow: To make a long story short, the district took a pretty tough beating, in my opinion, in those cases. There are several different elements to the battle. But the main case that I think about, because it was going on when I was still there and it was decided not too long after I left, is a case that's called *Committee to Save Mokelumne River v. East Bay MUD.* It's recorded in the Federal Reporter. It was decided by the Ninth Circuit, [United States] Court of Appeals on December 29th, 1993.[1] And I'll give you a copy of the opinion.[2]

LaBerge: Great. Okay.

Maddow: In effect in that case the Court of Appeals held that the federal district court judge up in Sacramento, Judge [Lawrence] Karlton, was correct when he determined that Mine Run Dam and the efforts of the utility district in particular should be regulated, could be regulated under the federal Clean Water Act. When Mine Run Dam got built in the first place and then as we began to deal with the Committee to Save the Mokelumne arguments, et cetera, one of the things that we had relied upon, frankly, was a legal opinion which I expressed--I wasn't the only one, but I certainly did--that Mine Run Dam was not subject to the requirements of the Clean Water Act concerning getting something called an NPDES permit, National Pollution Discharge Elimination System permit. That's the type of permit you find on sewage treatment plants.

There had been some case law, particularly a case called *National Wildlife Federation v. Gorsuch.*[3] She was the administrator of the EPA back in the seventies, I think. Those cases indicated to me that a mine was not a point source and that

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[1]13 F.3d 305 (9th Cir. 1993).

[2]See Appendix.

[3]693 F.2d 156 (D.C. Cir. 1982).

therefore NPDES requirements didn't apply. Judge Karlton held and the Ninth Circuit affirmed the decision that said that this dam was different, and therefore regulation under the Clean Water Act was possible.

I don't think we would have gotten to that decision had the EPA [Environmental Protection Agency] attorney not walked into the courtroom on the day Judge Karlton was holding the critical hearing and stated for the first time that the EPA decided that, by golly, it was possible for this dam to be regulated under the Clean Water Act. They had never made a commitment. They had never said anything. And then all of a sudden, in the middle of the hearing, their lawyer showed up and spoke. It came as a real surprise to us.

That was important in the way the judge made his decision, but I don't mean to sound as if I'm attacking the EPA or that person. Those kinds of things happen in litigation all the time, which is one reason why litigation is frequently not a good tool for accomplishing any particular objective. The point of it is that as a result of all this litigation, the utility district ended up moving from Good Samaritan to Deep Pocket. So now, in the years since I've left, the utility district has found itself having to come up with a very expensive fix for the old Mine Run Dam.

In fact, it's my understanding that Mine Run Dam will be dismantled as a part of this. I find that to be somewhat ironic because the data which was assembled at the time the case I've been referring to was decided indicates that Mine Run Dam made an enormous contribution to containment of the contaminants which otherwise would have reached the Mokelumne River, reducing those contaminants by something well in excess of--as I recall, it's something like 99 percent. Now, that number needs to be checked by someone, and there's no question that some contaminants continued to reach the Mokelumne after those facilities were built, but dramatically reduced in volume and rate.

Even so, the court said, "We're not getting to the facts. This case is being decided on the law. Can this particular set of facilities be regulated as a result of the Clean Water Act, the way in which the Clean Water Act works?" As I say, we lost that case, and the result has been that the district has ended up in this deep pocket mode.

There was a unanimous decision of the Ninth Circuit Court of Appeals. But there was a concurring opinion by Judge Fernandez that really caught my attention because my reading of his concurring opinion is that he was reaching the same conclusion as the other members of the court, but he was really troubled by it. And he said--let me see if I can find that critical passage or two.

[Reading] "Unregulated quantities of pollutants were flowing into the river and causing fish kills and the like long before East Bay MUD and Board" (the regional board) "did anything at all. Those entities sought to eliminate the disasters caused by that unregulated flow, and that is why the project was built. The result has been a significant improvement in the river's environment and a boon to aquatic life." And there's a good deal more discussion of the legal principles, et cetera, that were involved.

And he says, "Appellants" (the district and the regional board) "earnestly argue that EPA's approach, and that of the appellee's, will not serve the long-term purpose of bettering the aquatic environment. They indicate that it takes no genius or epopt," e-p-o-p-t.[1] I don't know that word. I remember looking it up when the decision came out in 1993, but I've forgotten what it is. "...it takes no genius or epopt to see what the message will be. Do nothing!" Exclamation point. "Let someone else take on the responsibility. Let the water degrade. Let the fish die. But protect your pocketbook from vast and unnecessary expenditures. Do not try to bring some order out of

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[1]Webster's defines epopt as: an initiate in the highest grade of the Eleusinian mysteries; hence, one instructed in a secret system.

environmental chaos. In short, appellant suggests that no Odysseus or Daedalus crafted the policy which we are now asked to follow. Perhaps they are correct. I suspect they are."

That, to me, is a judge who was very troubled by the place that the law left him. He couldn't help but reach that result. But it's a good characterization of where the utility district found itself. What I always thought was really interesting was that about the time this was all going on, the executive director of the State Water Resources Control Board, after the trial court decision, sent out a memorandum to the executive directors of all the regional boards, and he in effect said, "Do nothing. Don't embark on any mine waste cleanup problems because the state can end up holding the bag." I think that's lousy public policy, but that's the result of this decision. Do nothing.

I don't know what they've done since then, but it does show --I don't quarrel with Mr. Jennings or the Committee to Save the Mokelumne's attacks that they brought. I don't quarrel with the result. I'm just saying that from a public policy standpoint sometimes you have to take a little broader view, and I don't think that that was evidenced in the case, as I view it. Mr. Jennings would argue that, I'm sure.

As it now stands, the utility district and the Regional Water Quality Control Board have embarked on a very significant cleanup program. I don't know all of its details. I'm sure that that can be found out from the utility district. But it's going to involve the dismantling of Mine Run Dam, and it wouldn't surprise me at all to find out that one of the other things it will involve is finally constructing those ditches that were Walt Anton's idea to keep the clean water from getting into the mine. That might be one of the best things that could happen. If it had happened back in 1978, maybe we wouldn't have gone through the rest of all this.

The legal department at East Bay MUD was very much involved in this. So was the district's wastewater department, largely because it was viewed as a series of very difficult regulatory

agency problems that involved both the EPA and the state agencies. From an organizational standpoint, the general manager (Mr. Gilbert) made the determination that those kinds of problems could best be handled in the district's wastewater department, where they had a tremendous amount of experience in dealing with EPA and the regional and state boards, as a result of the wastewater things that were going on in the district that I'll talk about in a moment.

So the leadership of the district, from a technical standpoint, came from Wally Bishop and Mike Wallis and the water quality people. A man named Richard Sykes. The lawyers were very much involved. The district had special counsel, a Washington law firm called Swidler & Berlin. Very good lawyers who really know their way around the Clean Water Act, but they took a beating here. On the other side it was primarily the lawyers from the Sierra Club Legal Defense Fund, who were good people and who litigated effectively.

I think one of the results of the settlement of one of the pieces of litigation was that the utility district paid attorneys' fees to the Committee to Save the Mokelumne. I think it was an award in the nature of private attorney general's fees. This happened after I left. But it's my general understanding, that someone from the utility district can confirm, that funds paid by the utility district, either as attorneys' fees or perhaps damages, but I think attorneys' fees, were used by Mr. Jennings in either his current organization or his original organization, the Committee to Save the Mokelumne, or perhaps through another organization he's involved in called the California Sport Fishing Protective Alliance.

In any event, one way or another, they created an organization called Delta Keeper. Kind of like Bay Keeper here in the Bay, where there is a staff of scientists and volunteers and gosh only knows what else, who deal with water quality problems in the Bay. Bill Jennings is the Delta Keeper, and his organization does the same sort of thing up there. I believe it is at least partly funded through this East Bay MUD award through

one of these pieces of litigation. I have no hard evidence, but someone from San Joaquin County told me that a few years ago.

There were two parallel pieces of litigation. One was the action by the utility district against the Commerce Department. That was started shortly before I left. Swidler & Berlin was also handling that. It has been resolved against the district since then.

And then the Committee to Save the Mokelumne, I believe, actually through another law firm, another group, not the Sierra Club Legal Defense Fund but another, perhaps the Earth Island Institute, brought an action under the California Toxic Pits Control Act, and that litigation was filed before I left. It was kind of put on hold, pending the outcome of the case before Judge Karlton. And I know that that case is no longer on hold, but I don't know its exact status, and I don't know exactly how it has been resolved. And that's something, again, you'd have to find out from the utility district.

A huge round of litigation and lots of lots of attorneys' fees, lots of tough fights. The utility district took a bit of a beating. I continue to believe that, from a policy perspective, what the utility district did in '78 was the right thing to do. I wish it had been done better. I wish that the utility district had not had to do it in '78, but if it hadn't done what it did, the consequences could have been much worse.

That's the sordid tale of the Penn Mine in this man's perspective.

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LaBerge: Anything more on that tale?

Maddow: When we visited Penn Mine, we should have taken four-wheel-drive vehicles because it was a little rocky. But when you first drove into the mine site, when you first saw it, it looked like you were on a moonscape rather than on Earth because it was this area

that had been so heavily mined and it was so heavily covered with material that had been brought up out of these mine shafts and left in various and sundry states.

But the most eerie thing about it was that there were these evaporation ponds, and the water in them was laced with a variety of heavy metals, and in the late afternoon sun the colors of those things were like a painter's palette. It was just eerie. It was one of those things where you thought, "This is not a good place for any form of life to be." [chuckling] And that, of course, is one of the principal things that was motivating Mr. Jennings and the people who brought the actions against the district.

And they're right! It's just how do you cope with that, under the circumstances? What kinds of resources do you put into that?

Public Policy Issue

LaBerge: Who was the head of the State Water Resources Control Board then?

Maddow: The executive director at that time was Walt Pettit. He is still the executive director. I would have to say that this memorandum that he sent to the executive officers of the regional boards would have been in 1992 or maybe early 1993. I'm sure that can be found, either through state board files or utility district files. I don't have a copy of it.

There was one other interesting thing. This was after I left. But it may be something that from an historic standpoint you might want to pick up on. In September of 1993, which was six months after I had left the district's employ, there was a dialogue between a man named Harry Seraydarian, who was a very high-level official with the EPA in Region 9 in San Francisco. He was the director of the water management division of Region 9.

Harry made an appearance before the East Bay MUD board of directors in a public meeting on September 14, 1993, and tried to urge the utility district board to enter into a consent order for the cleanup of Penn Mine. That dialogue was transcribed. The transcription is 47 pages long, and I got a copy of it at some point, and I'll be happy to loan it to you. I have no idea what use you can put it to.[1]

But the reason it may be interesting from an historic perspective is that in September of 1993 the utility district board of directors was led by people who were very strongly committed to environmental protection and environmental issues. And their frustration with the approach which the EPA was taking just drips out of these pages. For me, it was kind of a microcosm of the frustration that the utility district, back in 1978, when we were getting started, through the eighties and into the nineties, when we had the board that was in charge of East Bay MUD that was so highly energized in an environmental direction--they all exuded this type of frustration at one point or another, and this transcript just catches it for that last board. And that's why I thought, from an historic perspective, that's an interesting dialogue.

LaBerge: And I'll return this to you?

Maddow: Of course.

The other document I will loan to you but I would like to get back at some time was from about a week later. The same executive director of the regional board, Walt Pettit, wrote a letter to Mr. Seraydarian of the EPA, expressing the concerns of the State Water Resources Control Board, at least at the staff level, to this proposed consent order that EPA was suggesting for Penn Mine.

In the first place, it's a very well-written letter, from my perspective. You know, a lot of people might want to argue with

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[1]Deposited in The Bancroft Library.

that, but the reason I think it's so well written is that it does an excellent job of relating the public policy issues and the legal issues and the regulatory issues, and what it shows is how they didn't always coincide. And it becomes a question of balance and perspective.

These two documents, taken side by side--the transcript of the Seraydarian dialogue in particular, with East Bay MUD's director, Andrew Cohen, and then this letter from Walt Pettit to Seraydarian. I find those to be fascinating from the standpoint of anybody who ever wants to do a case study of the collision of regulatory and legal and public policy themes.

So I'll pass those along. I have no idea whether they're the kind of thing that can fit into the kind of project you're doing. Again, these occurred six months after my departure from the utility district, so I can only offer them as something that's been a part of my historic reading. But a good little snapshot. That's all I want to say about Penn Mine.

EPA's Involvement

LaBerge: The suit was brought by the Committee to Save the Mokelumne?

Maddow: Correct.

LaBerge: The EPA was involved because of the Clean Water Act?

Maddow: Yes.

LaBerge: Or the friend of the court? Or what?

Maddow: Well, the EPA had decided--that's a very good question, and I should have a more precise answer than I'm about to give you, because my recollection is just a little foggy.

LaBerge: But when you said the EPA lawyer waltzed in.

Maddow: Well, EPA was not a party to the litigation.

LaBerge: Okay.

Maddow: But the opinion of the EPA was considered to be of considerable importance to the court, and as I recall, Judge Karlton actually asked for their input at one point, for their contemporaneous, administrative interpretation of the act. They are the ones charged with the implementation of the act. As I recall, that's referred to in the appellate court decision that I just passed onto you. The place I remember seeing it most recently is in Judge Fernandez's concurring opinion again. He said, "It seems to me that, given the history of this project, the EPA could properly have determined that this really is much more like the dams it dealt with in *National Wildlife Federation v. Gorsuch*," et cetera.

And then he goes on to say, "But it did not. In fact, the information before the district court and before us indicates that EPA considers the project to be a point source." And so EPA came to that decision, that it was a point source, and EPA on having come to that decision in essence had to take some kind of enforcement action. That consent order, which is the subject of the dialogue in the transcript I just gave you and the Pettit letter, was an outcome of EPA's determination that some sort of action on its part needed to be taken.

For a long time, the utility district thought that EPA involvement could be a good way to solve the problem if EPA took a point of view that perhaps started with what the traditional case law had been, and perhaps took more of a problem-solving type approach to this. Instead, they took a pure regulatory approach and said, "Thou shalt," rather than "We can." And that was an enormous frustration, I know, to the utility district, in particular to the board of directors of the utility district in the nineties.

Wastewater Treatment

LaBerge: Well, since you mentioned wastewater, shall we go into that?

Maddow: Yes. And I have a couple of things I can say about that, and I'll make it relatively brief. When I arrived at the utility district in the early seventies, it was in the process of being one of the agencies to comply in a very big way with the 1972 Amendments to the Federal Water Pollution Control Act. Those are the amendments that required sewage treatment plants to go to secondary treatment. Frank Howard and Jack Reilley, but mainly Frank, were working on the legal aspects of what it was going to take to bring the utility district into compliance with the federal act.

That legal work was primarily done by Frank. I got involved as much as anything else in the early years in contract reviews and things like that, but the regulatory work was principally work which Frank did, and did effectively.

Much later, the utility district at one point looked at the possibility of getting what was called a secondary waiver, given the nature and location of the sewage treatment outfall. In essence, what that was all about was that Congress provided that certain outfalls into ocean water would not necessarily require full secondary treatment. If you didn't have to go to full secondary, you could have a much less expensive plant to build and operate, and that sort of thing.

So that was one of the options that the utility district actually looked at and I guess I would have to say pursued in a kind of a limited way. Even though its outfall was in the Bay, that didn't pass muster, and the utility district backed away from pursuing that alternative and in fact the district did build a full secondary plant, a model plant, really an outstanding plant, down there.

Wet Weather Program

Maddow: My involvement actually was greater in the wet weather things a little bit later. One of the elements of the Federal Water Pollution Control Act amendments of '72--that was Public Law 92-500--was that they matured and they came back before the Congress for reviews later. That was planned. That evolved into the Clean Water Act. And one of the things that came through the Clean Water Act was a statutory mandate to eliminate infiltration and inflow from storm sewers into sanitary sewers.

All over the country there has been this major effort to deal with what's called the CSO, combined sewer overflow problems. San Francisco, for example, for decades had combined sanitary and storm sewers, and one of the reasons why they have overflows when you get 1/100th of an inch of rain over there is because you get all the storm water mixed in with the sanitary sewers. And they have spent a billion and a half dollars or something, trying to get rid of that problem.

Well, in the case of the utility district, it was a tough engineering and institutional problem to cope with those wet weather concerns because the utility district doesn't have the collector sewers. The collector sewers belong to the six cities and to the sanitary district that are members of or participants in, this wastewater system on the west side of the hills. All the utility district has is the interceptors and the treatment plant and the outfall.

The problem with regard to storm water infiltration and inflow was primarily up in the collection system sewers. There were some problems down in the utility district system because you had to be able to accommodate peaks, and you had to be able to deal with treatment. The challenge was to find a project that would meet the regulatory and statutory objectives for the most reasonable investment of funds that were going to have to be generated by local ratepayers, because by the time we got around

to a wet weather program, there essentially wasn't any grant money anymore.

When the secondary sewage treatment plant was built, there was a lot of grant money around. Seventy-five percent federal grant money and 12½ percent from the state, so it was built with 87½ percent grant money. By the time we got around to the wet weather program, which was a much bigger undertaking in terms of dollars, there wasn't any grant money anymore.

So loans and revolving funds and all kinds of things had to be a part of it. Anybody who lives west of the hills and in the sewage treatment district knows that their sewer bills sometimes now are as big as their water bills, and that's because of the wet weather program and improvements in collector sewer systems.

The utility district's role was a fascinating one, and I have to give Wally Bishop the credit for being the architect of this. The utility district's role was first to create what was called a Joint Powers Agency, which was intended to attack the problem of building a wet weather system for the East Bay that would meet federal law. Each of the cities in Special District No. 1, plus Stege Sanitary District, in the Kensington area--those are the entities that contribute sewage to the wastewater system. Each of them was a member of the joint powers entity. East Bay managed it. The joint powers entity in essence designed, financed, and constructed a wet weather program. The cities built many of the pieces within their own systems themselves, but the project that got built ultimately--I call it the "stealth public works project."

LaBerge: That's right.

Maddow: Not very many people in the East Bay knew it was going on, but close to $650 million, as I recall, of money was spent upgrading the sewage treatment systems, separating sanitary sewers from storm sewers. Before this was done, if you were ever down around Lake Merritt, especially down at the foot of Lakeshore, and it was raining, you used to be treated to the sight of something

called the "fountains of Lakeshore," where the manhole covers out in the middle of the street would have water spurting up out of them or the covers would float away. Sometimes you'd see the manhole covers held down with big lead weights.

That was because you had a combination of storm water and sanitary sewer water, and the sewer capacity was exceeded. All that's gone now because of that wet weather program. And it happened in a quiet and efficient and effective way, and it was managed very effectively. It took efforts to get federal law changed, state law changed, regulatory procedures managed in a very effective way.

The lawyers had a minimal role in it. It was really done through the force of will and the persuasive powers of people like Wally Bishop and the people who worked for him. Dennis Diemer, Mike Wallis, a team of very capable people, and a top-notch team of consultants. We had lawyers who were involved in some pieces of it, but I have to say it was not a lead role. We were always in a support role.

But it was a challenging project because at the utility district wastewater problems are always seen as taking sort of a backseat to the water system problems. Those always have more sex appeal, more interest, and more political attention. But if you look at the utility district since the early part of the eighties, the action, in terms of its public works program, its engineering and construction programs, et cetera, was primarily in the wastewater system. And if you look around the staff of the organization now, many of the top people--the general manager, the manager of operations, the principal engineer in the water system--they all were hired as a part of that wet weather program, in one way or another. They were all hired to improve the wastewater plant. It's all part of that "stealth project."

LaBerge: You called it "stealth." Did other people call it "stealth?"

Maddow: I don't know if anybody else ever did. I called it the "stealth" because it was going on, and nobody knew it, kind of like those

airplanes that have that stealth technology so nobody's radar sees them. So that was my view of it.

Peripheral Canal Issue, 1982

LaBerge: Okay. What was the district's stance or reaction to the Peripheral Canal in 1982?

Maddow: As a general proposition, the utility district tried for a while to kind of stay out of the fight, and ended up in a position of, I think, opposition, mild opposition I guess I would call it, because it didn't want to get into the fight. The utility district took its water around the Delta, and there were those who used to say that the Peripheral Canal was an attempt to do in the eighties what the utility district had done in the twenties. Those were not fights or arguments the utility district really wanted to get into.

But it got drawn out a bit because of the political furor over the two bills that went through the legislature. First, there was Senate Bill 200, and then a few years later Senate Bill 346. I think it was 346 that ended up being the subject of the referendum, et cetera, that resulted in Proposition 9, I think it was.

LaBerge: Yes.

Maddow: And the negative vote on the Peripheral Canal.

The thing that I always found most interesting about it was the way in which the big political fight about the Peripheral Canal bled over into utility district board politics. At the time that the big fight was raging on a statewide basis, there was a man on the East Bay MUD board named Bill Moses, a very fine man, an attorney from out in Richmond. One of the governors had appointed him to the California Water Commission, which is like

the legislative body of the State Department of Water Resources. It has been rare that we've had an East Bay person on the Water Commission, and so I always thought that was a pretty good deal.

But the commission, at some point, took a position in support of one or both of Senator Ayala's bills that were to build the Peripheral Canal. Bill Moses had to stand for election to the East Bay MUD board, and he was opposed by a man named Jack Hill, who, as one of the centerpieces of his campaign, raised the fact that Bill Moses was a supporter of the Peripheral Canal, "which was a terrible thing," and of course in Bay Area politics it's always been seen as a terrible thing.

And so, from my perspective--I don't know whether either Moses or Hill would agree with this--but from my perspective, that was one of the reasons why Hill beat Moses--I think the first time an incumbent ever got beat while standing for reelection. One of the principal reasons was that Hill ran against the Peripheral Canal. I always thought that that was fascinating because the district really was a little bit removed from the Peripheral Canal issues.

A little earlier than that, in--let me think now. In the last year or year and a half, something like that, of Ronald Reagan's term as governor, the man who was at that time the head of the Department of Water Resources--I think it was John Teerink--wanted to try and take the first steps toward building the Peripheral Canal, based upon the Burns-Porter Act which the voters had passed in 1960.[1]

There was a school of legal thought back around the early eighties, or political thought, that they didn't need any new authorization, they didn't need any new bill to build the Peripheral Canal. They could build it based upon what the voters had approved in 1960. And so one of the things that they tried

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[1]The Burns-Porter Water Bonds Act of 1959, called the California Water Resources Development Bond Act, was passed by the voters as Proposition 1, 1960.

to do was to show some movement, some first step, some construction actually moving forward on the Peripheral Canal during that governor's administration.

By coincidence, the step that they tried to get started with was awarding a contract for the construction of a siphon where the Peripheral Canal would have gone under the Mokelumne aqueducts. The Environmental Defense Fund got wind of that somehow, and one of their people--as I recall, it was one of their lawyers--came before the board, or was talking about coming before the board and raising an issue about that.

And the Department of Water Resources, as I recall, kind of backed away, and the issue really didn't get joined. And so that was part of the prologue to what later became the two Ayala pieces of legislation and this political furor around the Moses and Hill election.

But the utility district was pretty much trying to keep its distance from the big fight because it viewed itself as being separated from the Delta and wanting to stay separated from the Delta.

The last thing I'll say about it all is a story that I'll tell on Gayle Montgomery, who was, of course, in the public information office for the utility district but who previously had a series of important positions with the Oakland Tribune. He once told me that when Interstate 5 was constructed south of Stockton, that the borrow pits for the material that was used to build the embankment that the road sits on were actually selected after having looked at the proposed routing of the Peripheral Canal. And so in essence they scooped out what ultimately would have become portions of the canal right-of-way had the canal ever been built.

He showed me a photograph that was taken by a Tribune photographer, flying over that area in a rainy period, when all those little ponds--you know, parts of the borrow pit--it's like this linear borrow pit, with separators along the way, so it's a

series of ponds sort of paralleling I-5, along the track of what would have been the Peripheral Canal. The Oakland Tribune kind of broke that story, and I always thought that it was just kind of an interesting anecdote. Montgomery always took great pleasure in all of that.

My recollection of it was sort of rounded out by driving by one of those ponds with Gayle Montgomery one time and seeing it entirely covered with snow geese and seeing them all take off, which was one of those gorgeous sights that you sometimes see out in the Delta.

Now I don't know what the district's posture is with regard to the Peripheral Canal. The utility district has traditionally tried to keep a little bit of distance. It has traditionally tried to stay in the mainstream of northern California politics or political views on issues like the Peripheral Canal. And of course the northern California view has always been a very negative one in regard to the canal. The utility district tried to keep a little out of the main political flow of that, but there may have been policy positions that have been adopted since I left that are a little more towards the anti-Peripheral Canal sentiments than have been expressed up to here.

I always thought the Peripheral Canal and the water industry in northern California could make an interesting story for somebody because I think an argument can be raised that, to the extent it was going to produce a better-quality water for anybody, those who would most directly benefit would be northern California customers because there are northern California customers of the State Water Project in Alameda County and in Santa Clara County. I guess primarily those counties would be the ones I'd think of right around the Bay, who, you know, if the Peripheral Canal got built, they'd get better-quality water instantly.

And all they have is a short aqueduct between them and the Delta. They don't have any intervening storage or anything like that. And yet, in those areas you were seeing 93 percent "no"

votes on the Peripheral Canal referendum, et cetera. I always thought that there was a kind of a gap between the popular political side of things and what the water agencies might have been trying to do. I'm not trying to be an advocate for it. I'm just trying to observe that there is that gap.

I don't know whether there will ever be a Peripheral Canal. I don't think there will ever be the big one. I think ultimately something is going to have to get done to make sure that the drinking water that comes out of the Delta is going to be of an assured quality. And that's a different question. That can be a different question than, Should we build a Peripheral Canal? I think we're a long way from knowing what the ultimate result will be.

This Cal-Fed process that's now underway is the best hope for a comprehensive look at solving those issues. I think the utility district is probably a player in all that. I don't know exactly how they're participating, but I know they've had people in a lot of the meetings I've attended, that sort of thing.

I guess I would say other than being bashed mightily about the head and shoulders for having its own miniature version of the Peripheral Canal, and getting dusted by these various and sundry political issues, the Peripheral Canal has not been center stage for the utility district. Thankfully. [laughing].

Variety in the Legal Department

Divorce Case

Maddow: I wanted to tell you my five-minute vignette about variety. I've told this story many times. It may be on an earlier tape. I'll make it brief. One of the reasons I stayed at the utility district for twenty years as an attorney is that the variety was

the most constant factor. I'm not a litigator and never was. But in my tenure at the utility district I appeared in court in everything from a divorce case to a criminal case and probably everything in between, and my client was always the utility district.

The divorce case happened when I was the legal advisor to the finance department. There was an employee who was in a divorce, and his wife's attorney served an order seeking to attach the wages of this current employee, and he did it wrong. What had happened was, I believe that the employee's wife was a legal secretary, and she prepared the papers and her boss just signed them and really didn't look, and she was not aware of the special procedures that you then had to follow to get at the wages of a public employee.

I had to tell the paymaster he couldn't honor the order. And so the employee's wife's boss took the order down to the court, and the judge said, "What do you mean East Bay MUD's lawyer says they won't honor this order that I signed?! You get him down here!" And it's the only time a judge ever used the word "contempt" in relationship to anything that I had done, but that was the threat!

And so here I am, a young, green, wet-behind-the-ears lawyer for the utility district. Jack Reilley accompanied me. We trotted on down to the courthouse and went in to see this judge, and I very patiently explained what the law was. The judge by this time had looked it up and understood it. We knew we were right, and he knew we were right, and he dismissed us, and we walked out. I won't tell you the name of the judge [smiling]. But I will tell you that when we walked out and went around the corner and got in the elevator and the doors closed and it was just me and Jack, he kind of went off. And his face got very red, and he said in regard to that judge, "That supercilious son of a bitch!"

[mutual laughter]

Maddow: And it was a delightful moment for me in hindsight, although it was agonizing. But that was my divorce case that took me downtown.

Criminal Matter Diverted to State Water Resources Control Board

LaBerge: What about the criminal law matter?

Maddow: Sometime in the very late eighties or early nineties, I have forgotten which, the district attorney of San Joaquin County filed criminal charges against the board of directors, the general manager, the chief engineer, and one of the operators at East Bay MUD, concerning problems that were being experienced by fish down in the hatchery down below Camanche. The utility district was accused of allowing materials or placing materials that were deleterious to fish in the waters of the state, and that's a crime.

To make a very long story short, we were instructed by the board to defend this case vigorously. We viewed it as kind of a white collar crime situation, in particular in view of the way that the local district attorney was talking about the case in the press. And it had all kinds of potential overtones and possibilities for trouble with regard to how Camanche Reservoir operated and how the fish hatchery operated and all of that.

So more than anything else, the utility district wanted to get those criminal charges dismissed so that, to the extent there were problems, they could be dealt with in some kind of a regulatory proceeding. To make a series of long stories short, the utility district retained a very fine white collar criminal defense lawyer named Jeff White from the law firm of Orrick Herrington [& Sutcliffe] in San Francisco. Jeff was then the head of the litigation department there, an absolutely first-rate attorney.

We also retained a local attorney in Stockton, where the case was filed, a man named Patrick Piggott. Patrick knew the local rules and the district attorney's office and the court and all that, and we knew that we needed to have a local presence in that case as well. We very vigorously defended that case in an effort to avoid ever facing any criminal sanctions.

In effect, we ended up getting the case dismissed and kind of in favor of--it was as though it was diverted out of the criminal law system and over to proceedings related to water quality issues that would be before the State Water Resources Control Board.

LaBerge: Were you general counsel then?

Maddow: I was general counsel at the time. I got directly involved in the litigation matters. I in effect served as co-counsel with Jeff White and Patrick Piggott. Whenever there was a court appearance, I was there. When there were appearances before the State Water Resources Control Board, I was there. I probably did as much talking as any of them did.

Jeff White's role was to be the heavy-duty litigator on that case, in the event we needed it, and we did need their--they did a lot of writing. They're a very good firm, and we used them efficiently and effectively to try and keep our board of directors from being faced with criminal charges. And I think we did so well.

But at the same time, the utility district didn't run from the issues because the issues related to what was going on in Camanche Reservoir in dry years (that's what was going on; that's why there was a problem) were issues that needed to be managed and needed regulatory oversight, and the utility district knew it and had in essence invited it.

We ended up aggressively pursuing the water resources and water quality issues with the regional board and with the state board in particular. And, in view of that, we ended up getting

the criminal charges dismissed, without any adverse ramifications for the utility district. It was a lot of very hard work, very concentrated work in a short period of time. It took a lot of legal time and effort. Two-thirds of my time for probably six weeks.

I view it as a success story because not only did we avoid the awful consequences of seeing our top managers and our board facing criminal charges, but we straightforwardly and quickly addressed the water resources problems and the contamination problems, and solved them. And did so in a way that the utility district was proud of. It wasn't cheap, but the utility district was pleased with the result because it learned a great deal more about what it takes to manage its resources as a result of those efforts.

This is where the buzzard feather story comes in.

Solution

LaBerge: Just tell me, too, how the problem was solved?

Maddow: The problem was solved through what is basically a Camanche Reservoir Management Plan that, among other things, involves finding ways to be sure that you control the quality of the water that comes out of the reservoir and goes into the fish hatchery in order to protect the hatchery, and at the same time dealing with a variety of related problems having to do with the storage in Camanche, the flow below Camanche. It eventually evolved into what is known as the Mokelumne River Fishery Management Plan. It was one of the themes that evolved into that plan.

The utility district has built, for example, something called a Speece Cone, which is a form of, I guess I'd call it oxygenation device to get air and oxygen into the portions of the reservoir that become anoxic, low oxygen, toxic to fish, in

certain water quality conditions at the end of many summers, in particular dry years. A lot of things like that grew out of those efforts.

The criminal case kind of popped up in the middle of those efforts to deal with those water quality matters. It wasn't the triggering event. If anything, it may have intensified the efforts to solve the problems. It did not lead directly to any aspect of the solution.

The buzzard feather. At one time, in order to acquaint Jeff White and the lawyer who was working with him, an associate named Mary Novak, to acquaint them with the facts so that they would know what they were writing about and getting ready to argue about in any one of several forums, we went out on the site. We actually were on top of Camanche Dam. We were there with a man who at that time was a district employee. His name was Jeff Hagar. He was a fisheries biologist.

And Jeff [Hagar] was explaining what had happened to the fish in the hatchery. We could see the hatchery down to our left. We could see the reservoir off to our right as we stood on top of the dam. And Jeff was explaining the physical and chemical and biological facts. I was explaining, or attempting to explain to Jeff White, sort of the hydrologic facts as I understood them, with flows coming in from Pardee and in Camanche, et cetera.

Jeff White at one point said, "Well, let me see if I can say some of this back to you." And he said, "As I understand it, if the facts are such and so, we're not gonna have a problem. But if the facts are such and so, there is going to be a problem down in the hatchery, and if that's what facts turn out to be, it sounds like we're dead meat."

At that instant, a buzzard feather floated out of the sky and landed at my feet! I picked it up, and I said [slowly, portentously], "This is an omen. I don't know if it's good or bad, but it's an omen, and I'm keepin' this!" I guess it must

have turned out to be a good omen because within a month we had gotten rid of the criminal charges and we had gotten the case diverted out of the criminal system, and we were dealing with these issues in the regulatory environment, and we didn't turn out to be dead meat, thank goodness.

But it became one of my little mementos. I still have it on my desk. It sits over there on my desk, with my two spent bullets, one of which I found in my parking space and one of which I found on the steps of the training center [chuckling] when I worked at the utility district office down on Adeline Street. We were in what used to be called a "free fire zone" sometimes [chuckling].

But fortunately those criminal law experiences did not have serious consequences for the utility district. We all learned a lot about the way the criminal law and water resources interact. We learned a lot about the state board, the regional board learned a lot about it, and I think the San Joaquin D.A.'s office learned a lot about it as well. I think everybody walked away from it--I don't think anybody walked away too angry. I think we all thought, in the final analysis, the problem that had led to even giving any thought to filing criminal charges was addressed and a reasonable solution obtained.

You told me you wanted to talk about the change in the board.

LaBerge: Change in the board. Or, because we only have a little bit of time left, your overview of how water rights law has changed. I had the thought that I could add one of the articles you wrote, the family jewels? It is so good.

Maddow: I don't have much more to say beyond that.

LaBerge: All right. Then we'll put that in the Appendix.[1]

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[1]See Appendix, "Dramatic Changes in Water Rights Law Over the Past Couple of Decades--A Statewide Perspective."

Vision Comes from Board of Directors or General Manager?

Maddow: Let me talk about the board. And this is one man's perspective. I don't know if you'll be able to use it. It's not really legal in nature; it's more public policy observation from the standpoint of somebody who sat in a particular seat. I sat in there for twenty years.

I talked about what the utility district board was like when it was five members elected at large. That was a board that focused on the broad policy issues. They all looked at the whole district, and many times, the vision for where the district was headed would come from the board in those days. But at the same time, this was a board that recognized that under the Municipal Utility District Act [1921], the general manager is supposed to be the chief executive and has very strong powers, in some respect on a par with those of a city manager in a strong city manager form of government. In some respects maybe even a little stronger than that.

Well, as the board changed with the move to ward-by-ward elections, and as local politics became much more a feature of what was going on at East Bay, I think it was very interesting that the board in 1981 turned to Jerry Gilbert to be the general manager. He was a very experienced person who came to the district from having been the executive director of the State Water Resources Control Board, having been the president of the American Waterworks Association. He had a broad view of things. He was capable of developing a vision of what the utility was and could be.

And that was very much what Jerry's term as general manager for almost ten years consisted of. He had a board which had some very strong thinkers on it. They didn't always agree with one another, but they were capable of addressing the policy issues very effectively. And having that kind of a board and having Jerry, who was able to create and present to them a vision, for them to then apply their policy thinking--you may not like what

his vision was, you may not have liked what the results were, et cetera, but it was a system that worked, and we got a lot done in what could have been some tough times. We didn't always succeed, but we got a lot done, and there were some, I think, significant efforts made to contribute to the long-term picture that the utility district needed to focus on.

At the time Jerry left there was a significant change in the board as a result of the election in 1990. And this is not meant to be a commentary on the pre-1990 board or the post-1990 board from a political standpoint or from a personality standpoint. It's meant to be from a policy standpoint. The board that came in in 1990 wanted it to be the board that created a vision. It didn't want the manager to create a vision. It wanted the vision of what the district was in 1990 and could become--or in 1991, when they took office--they wanted that to flow more from the board.

It was a board that was split. They didn't have a unanimous board in regard to what that board's vision, or the majority of the board's vision was on what the utility district ought to be. So it was a somewhat tumultuous time, I think, for that board. The issues that the district was facing were the same. The policy matters the board had to deal with were the same. They had a different perspective. Many of the issues that the board had to deal with were hangovers from the previous period. But to the extent a new vision was being developed and shaped, and the policies of the district and the programs of the district flowed from that vision, it didn't come from the manager anymore. It came from the board.

The particular board member who was probably principally responsible for that vision only stayed on the board for one term, then chose not to run for reelection. And two of the--

LaBerge: Andy Cohen?

Maddow: His name was Andrew Cohen. He was the director from here in Berkeley. He had succeeded Helen Burke, who was the first of the

real strongly committed environmentalists to serve on the district's board. I've talked about her before. I have an enormous amount of respect for her. I have an enormous amount of respect for Andy Cohen. Andy provided most of the vision for the period of time when he served on the board. And he was effective in what he was trying to do. But, again, he brought in--the district was reorganized so that it was much less likely to have a staff that was going to throw off new vision statements or create new programs independently. Perhaps the most symbolic change was abolition of the position of Chief Engineer.

That role, staff's role, in that respect was kind of downgraded and pushed down. And that's okay. I mean, that's not the only organization that does that sort of thing. But when Andy Cohen left the board after one term, I don't think he expected that two of the people who had been elected when he was elected were going to lose in the next election.

And the result was when Andy left, taking his version of the district's vision with him, and when those other directors who had supported Andy got voted out of office; you had a new board, a board that was not entirely in sync with the vision that Andy had had. The person who had been brought in to manage the district under the board when Andy was on it and when Andy was the vision producer, and the organization that he had created to run the district under that, that all changed. For a whole variety of reasons, but that all changed.

The manager left. A new manager was selected. It was Dennis Diemer, who had been hired by Wally Bishop to work in the wastewater department and who would later become a very effective assistant chief engineer in the water system. Now we're at a point where I don't know where in EBMUD's organization the vision comes from. I'm too far removed to know, but what I observed in my tenure was that--in the time I was there, where the district was headed, what its policies were going to be, what its programs were going to be, usually flowed from this sort of central focus that either came from the board, back in the old days, that was a different kind of board; or a general manager who had a strong

board around him but who was a real visionary; or it came from an individual board member from within the majority group of the board.

And then, in 1994, you had a new election, and I don't know where the vision comes from anymore. That's not meant to be critical of the present board or the general manager or the staff. I'm just not down there, and I don't know who does it. But, to me, one of the things I learned over twenty years is that what the organization is doing, how it's trying to accomplish its objectives, starts with some of that. And if you don't have it, if you don't have it clearly defined, you can drift a little bit.

The utility district built a hell of a water supply project in the twenties. It built a hell of a project in the forties. It built a hell of a project in the sixties. It hasn't built anything since. And it needs to because it's out of water (in terms of safe yield), and it's facing a declining level of security because the "family jewels are made of paste," because it's got the FERC and the State Water Resources Control Board having taken under advisement decisions that could result in changing the productivity of their water rights, and they're sure not going to change them upward.

The utility district needs to move, and they're certainly trying to do so, and I give them a lot of credit for that. I don't know enough about what they're doing to know whether it's going to succeed. I hope it does. But I hope that they have the ability to take the long view, like the people did in the twenties and in the forties and in the sixties. What they did back then was to not only build a system but they built it for the ages. They built a system that was big enough so that the system they built in the 1920s lasted through World War II. That's all the district had.

And what it did was to serve Vallejo and Treasure Island and--San Francisco started its system before East Bay did, but East Bay finished first and served water to San Francisco in the

thirties, because East Bay had built a system that was big and flexible and capable.

The same is true of the second barrel of the aqueduct in the forties, and the same is true of Camanche and the third barrel of the aqueduct in the sixties. If it hadn't been for that, we wouldn't have been able to come up with the solutions we did for the drought in that big thing that we talked about that was done for all those many agencies in the seventies.

Those systems, those facilities are probably reaching their limit in terms of how much flexibility is left in them, whether or not they're going to supply the long-term needs, whether or not they can protect the quality of water the district wants to serve. Now the district has to face a whole new era of water treatment challenges and water quality challenges that are different from what we had before. And it's doing so in a time when I think the security of their water supply is perhaps more in jeopardy than it was during the time that I was there.

And whether or not they'll have the degree of security that they need and have always enjoyed in the past is going to depend in large part on what happens in forums over which they have less control than they used to have. And so the result is that there's a real test here of the policy makers and the people who run the district in terms of trying to accomplish things on the scale of what was done in the twenties, forties, and sixties, in this period of the nineties and the new millennium. And that's a real severe test. I wish them all the luck and success in the world. I just hope that they have a broad enough vision of it to be able to understand what they're getting into.

I was really encouraged the other day. I was at a meeting there representing another client. The meeting just happened to be taking place in the East Bay building. We were in a meeting room, a conference room, and there was a briefcase sitting in there, and there was a jacket on the back of a chair, and they were just there--they did not belong to anyone at the meeting I was attending. Lo and behold, they turned out to be Art

Littleworth's. They are using him again to assist them in regard to the American River stuff. And I say, "Great." If that's what this board and Bob Helwick and Dennis Diemer have done, that's ideal because he's just as good as they come, and I respect him and I know they value his advice, and that will be good stuff.

That's my speech.

Decision to Enter Private Practice

LaBerge: Okay. Well, in one minute, can you tell me why you decided to go into private practice?

Maddow: Yes. I was becoming too much a part of the administration of the district and not enough its lawyer. In part because with the changes that went on as a result of the 1990 election--and, again, this is not a focus on the election; it's just the evolution of the utility. A number of people had left the district--Jerry Gilbert, Ted Way, people who had been there for a long time. We had a change in the board. The leadership that came in with the new board wasn't interested in what had happened with the old board, and yet they knew that they had to understand some things, there had to be some continuity. And I became sometimes one of the sources through which they tried to learn what some of the past had been.

So I found myself spending a lot of time sort of being the institutional memory and the keeper of the corporate history and all that. And that's fine, but I kept having to do it. And then, you know, a new general manager came along. I really liked the man, but I ended up having to do a lot of that with him.

LaBerge: Is this Mr. Jorge Carrasco?

Maddow: Yes. And then, once it came time for him to reorganize the district, I was asked to get involved in helping to brief the

consultant who was doing the reorganization. Actually, I guess I kind of had a hand in selecting that consultant because I wanted to be sure they picked a firm that knew something about municipal utility districts, and they did. They picked a good firm.

And I got asked to help brief the guy who did the study, and I did. I spent a lot of time doing that. They came out with some recommendations that, had I been the general manager I wouldn't have done it that way, but I wasn't the general manager, so what I thought and what I think now doesn't count. In fact, I didn't like the organizational change that was happening, and that was a concern to me.

And lo and behold, as it began to unfold, I found myself heading down the road of becoming the institutional memory and the corporate history for the newly hired people. I had done a lot of that. In mid 1992 I was asked if I wanted to go down and became the general counsel of the Metropolitan Water District when Mr. Vendig retired. I had been offered that job in 1988 and turned it down, and they asked me if I had changed my mind in '92, and I thought about it, and I said no.

But then, in the winter of '92, on the day after Christmas, I was in England. My daughter was at the London School of Economics, and we went over to spend Christmas with her. And the day after Christmas I took a long walk on a cold, cold day, down along the Thames and up through Chelsea. I kind of came to peace with myself and said, you know, I'm really not enjoying what I'm doing as much as I think I should be right at age, whatever I was, 49. And if a pure legal position comes along that will allow me to not have to relocate to southern California, I'll consider it.

Well, a week thereafter, I got a call from Jeff Polisner out in Walnut Creek, who told me that Fred Bold, who had been practicing water law in Contra Costa County for forty years, had decided to retire as his eightieth birthday had just approached. And would I be interested in taking over his practice? It instantly intrigued me, and I gave it a lot of thought for a

month, almost a month. It was December 26 that I took a walk with myself. It was January 3 when Jeff called me. And it was February 1 when I told my staff that I decided to leave.

It didn't have anything to do with "the board" or "the management" or "the district." What it had to do with in a sense was all of those things, but mainly it was me facing a sort of a career choice at age 49. Do I want to keep on doing what I'm doing? At that point--it hadn't always been the case, but at that point, I was working, I believe, very successfully with that board and with that manager, and I was not at cross purposes with any of them. And, frankly, I think I could have stayed and still been there now and continue to have what I would consider to be a successful career.

But I didn't want to do it anymore. I was ready to do something else, and I'm glad I made the change. I think it was healthy for me, and I think it was healthy for the utility district. Bob Helwick is now doing a great job as general counsel, I suspect. He's ideally situated for what they need at this point.

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APPENDIX--Robert B. Maddow

A. COMMITTEE TO SAVE MOKELUMNE RIVER, Plaintiff-Appellee v. EAST BAY MUNICIPAL UTILITY DISTRICT, et. al., Defendants-Appelants. No. 93-15999. United States Court of Appeals, Ninth Circuit. Argued and Submitted Sept. 1, 1993.
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cation of the appropriate authority are received by the district court." *United States v. Juvenile Male*, 923 F.2d 614, 620 (8th Cir.1991). *See also United States v. M.I.M.*, 932 F.2d 1016, 1019 (1st Cir.1991) (dismissing case for lack of jurisdiction due to clear directive of section 5032 that no proceedings against a juvenile can commence until the court receives at least a good faith proffer of the juvenile records or a certificate as to their absence); *United States v. Brian N.*, 900 F.2d at 221 (same).

Because the jurisdictional requirements of section 5032 were not met, we vacate the adjudication of delinquent status. The case is remanded to the district court with instructions to dismiss the information without prejudice.

VACATED AND REMANDED.

COMMITTEE TO SAVE MOKELUMNE RIVER, a California non-profit corporation, Plaintiff-Appellee,

v.

EAST BAY MUNICIPAL UTILITY DISTRICT, a California Municipal Utility District, et. al., Defendants-Appellants.

No. 93-15999.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 1, 1993.

Decided Dec. 29, 1993.

Environmental group brought Clean Water Act action against municipal utility district and members of regional water quality control board, which owned and operated abandoned mine facility, alleging that facility discharged pollutants without National Pollutant Discharge Elimination System (NPDES) permit. The United States District Court for the Eastern District of California, Lawrence K. Karlton, J., found that defendants discharged pollutants into reservoir and river without permit in violation of Act. Defendants appealed. The Court of Appeals, Pregerson, Circuit Judge, held that dam used to collect acid mine drainage from abandoned mine site was subject to Clean Water Act's permit requirements.

Affirmed.

Fernandez, Circuit Judge, filed a concurring opinion.

1. Health and Environment ⇐25.7(13.1)

To establish violation of Clean Water Act's National Pollutant Discharge Elimination System (NPDES) requirements, plaintiff must prove that defendants discharged, i.e., added a pollutant to navigable waters, from a point source. Water Pollution Control Act Amendments of 1972, § 301(a), 33 U.S.C.A. § 1311(a).

2. Health and Environment ⇐25.7(13.1)

Dam used to collect acid mine drainage from abandoned mine site was subject to Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permit requirement; admission that drainage was collected in dam reservoir and, from time to time, passed over spillway or through a valve into river and another reservoir conclusively established discharge of pollutant from mine facility within meaning of Act. Federal Water Pollution Control Amendments of 1972, § 301(a), 33 U.S.C.A. § 1311(a).

3. Federal Civil Procedure ⇐2481

Factual issue raised by owners and operators of abandoned mine facility concerning historical level of pollution compared to current level of pollution emanating from facility was not material to resolution of Clean Water Act claim that owners and operators were discharging pollutants into reservoir and river without National Pollutant Discharge Elimination System (NPDES) permit in violation of Clean Water Act and, therefore, any question as to that issue did not preclude summary judgment on issue of liability. Federal Water Pollution Control

Act Amendments of 1972, §§ 301(a), 402(a), 33 U.S.C.A. §§ 1311(a), 1342(a).

4. Health and Environment ⇐25.7(23)

Municipal utility district and regional water quality control board could be held liable under Clean Water Act given the absence of any statutory authority to exempt board or district from liability under the Act. Federal Water Pollution Control Act Amendments of 1972, §§ 101–517, 33 U.S.C.A. §§ 1251–1376.

5. Federal Courts ⇐272

Eleventh Amendment did not bar prospective equitable relief which environmental group sought in Clean Water Act action brought against municipal utility district and regional water quality control board. U.S.C.A. Const.Amend. 11; Federal Water Pollution Control Act Amendments of 1972, §§ 101–517, 33 U.S.C.A. §§ 1251–1376.

Edward Berlin, Swidler & Berlin, Washington, DC, for defendant-appellant East Bay Mun. Utility Dist.

Sara J. Drake, Deputy Atty. Gen., Atty. General's Office, Sacramento, CA, for defendant-appellant California Water Quality Control Bd. Members, Central Valley Region.

Adria Y. LaRose, William S. Curtiss, Sierra Club Legal Defense Fund, Inc., Maria Savasta Kennedy, Michael W. Bien, Rosen, Bien & Asaro, San Francisco, CA, for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before: REAVLEY,* PREGERSON, and FERNANDEZ, Circuit Judges.

PREGERSON, Circuit Judge:

The East Bay Municipal Utility District and the members of the California Regional Water Quality Control Board, Central Valley Region, defendants below, appeal the district court's order granting partial summary judgment in favor of the Committee to Save the Mokelumne River. The district court, in a well-written, well-reasoned opinion, found that defendants owned and operated the Penn Mine facility, and that the facility discharged pollutants into the Camanche Reservoir and Mokelumne River without a permit, in violation of the Clean Water Act, 33 U.S.C. §§ 1251–1376. On appeal, defendants contend that (1) Mine Run Dam, part of the Penn Mine facility, is not subject to the discharge permit requirements of the Clean Water Act; (2) the Water Board is immune from liability under the Act; and (3) summary judgment was improper because a triable issue of material fact exists whether there has been an "addition of pollutants" within the meaning of the Clean Water Act.

We have jurisdiction under 28 U.S.C. § 1292(b). We affirm.

BACKGROUND

The Penn Mine property is the site of an abandoned copper and zinc mine that operated intermittently from the 1860s through the 1950s. The companies that mined the site left behind reactive mine tailings, waste rock, and excavated ores. When exposed to oxygen and water, these materials form "acid mine drainage," which contains high concentrations of aluminum, cadmium, copper, zinc, iron, and sulfuric acid. Unless impeded, rain water falling on the site carries this acid mine drainage downhill, in the form of surface runoff, into the Mokelumne River.

In the 1960s, the East Bay Municipal Utility District (the "District") acquired a portion of the Penn Mine property to build the Camanche Reservoir. The District owns water rights on the Mokelumne and supplies water to towns and cities east of San Francisco. In 1978, the District, joined by the California Regional Water Quality Control Board, Central Valley Region (the "Board"), constructed the Penn Mine Facility (the "facility") in an attempt to reduce the threat of continued toxic runoff from the site. The facility consists of Mine Run Dam and the Mine Run Dam Reservoir, surface impoundment, along

* Hon. Thomas M. Reavley, United States Circuit Judge, U.S. Court of Appeals for the Fifth Circuit, sitting by designation.

with a series of other impoundments, drainage ditches, pipes, valves, culverts, and channels. The Mine Run Dam and most of the Mine Run Dam Reservoir are located on property owned by the District. A small portion of the Mine Run Dam Reservoir extends onto property owned by a defunct mining company.

The facility was designed to capture contaminated surface water flowing through the site, and to contain and evaporate the water through a ponding and recirculation system, preventing the contamination from reaching the reservoir and river below. Each of the two drainages once occupied by Hinkley Run and Mine Run creeks, which formerly flowed through the site, now contains a cascade of three impoundments. Water contaminated with toxic pollutants runs off the mine site and collects in the upper impoundments and then flows to the lower impoundments, eventually collecting in the Mine Run Dam Reservoir. A pump and pipe owned by the Board recirculates polluted water from Mine Run Dam Reservoir back into the upper impoundments located in the former Mine Run Creek drainage basin. Defendants operate that pump.

The facility also consists of two principal diversion ditches that divert the surface flows of Hinkley Run and Mine Run creeks around the abandoned mine site. Those diversion ditches are intended to isolate the facility from the unpolluted flows of these two creeks by diverting the streams around the facility and directly into the Mokelumne River and Camanche Reservoir, below.

As part of the facility's ongoing operation, various pipes, channels, and gullies carry polluted runoff from the mine tailings and dikes into the Mine Run Dam Reservoir and other facility impoundments. In addition, from time to time, water and drainage collected in the Mine Run Dam Reservoir have passed over the spillway or through the dam's discharge valve into the Mokelumne River and Camanche Reservoir.

The Clean Water Act (the "Act"), 33 U.S.C. §§ 1251–1376, is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In pursuit of this goal, the Act prohibits the "discharge of any pollutant" into navigable waters from any "point source" without a permit. *See* 33 U.S.C. § 1311(a) (except as otherwise provided in the Act, the discharge of any pollutant by any person shall by unlawful); § 1342(a) (authorizes EPA Administrator to permit some discharges of pollutants under a National Pollutant Discharge Elimination System ("NPDES")); § 1362(12) (defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source").

The Committee to Save the Mokelumne River (the "Committee") initiated this suit against the District and members of the Board under the citizen suit provisions of the Act, 33 U.S.C. § 1365. The Committee seeks a judgment declaring that defendants have discharged pollutants from the Penn Mine facility without a permit, in violation of the Clean Water Act, and enjoining defendants from discharging pollutants from the facility until they have obtained an NPDES permit to do so. The Committee also seeks an order requiring defendants to devise a remedial plan to remove and dispose of contaminated sediment in the reservoir.

Defendants moved to dismiss this action on a number of procedural and substantive grounds. At the same time, the Committee moved for summary judgment on the issue of defendants' liability under the Act. The district court denied defendants' motion and granted judgment in favor of the Committee on the issue of liability.

On appeal from the district court's order of summary judgment in favor of the Committee, defendants raise four issues. They contend that the district court erred in granting partial summary judgment in favor of the Committee because (1) Mine Run Dam is not subject to the discharge permit requirements of the Clean Water Act; (2) a material issue of fact exists as to whether defendants have "discharged a pollutant" within the meaning of the Act; (3) defendants' activities in constructing and operating the facility are regulatory, and therefore cannot constitute "additions of pollutants" under the Act; (4) the Eleventh Amendment immunizes defendants

from liability under the Clean Water Act. We address each of these arguments in turn.

DISCUSSION

A. *Is Mine Run Dam subject to the Clean Water Act's permit requirements?*

[1, 2] To establish a violation of the Act's NPDES requirements, a plaintiff must prove that defendants (1) discharged, i.e., added (2) a pollutant (3) to navigable waters (4) from (5) a point source. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C.Cir. 1982). Defendants concede that acid mine drainage is a "pollutant," that the Mokelumne River is among the covered "navigable waters," and that the spillway and valve of the Mine Run Dam and Reservoir are "point sources"[1] from which polluted water has entered the Mokelumne River. They contest only the issue whether they have "added" pollutants to the Mokelumne.

Defendants argue that under well-established case law, the Mine Run Dam is not subject to the Clean Water Act's permit requirements because it is a dam that "does no more than impound navigable waters and impede their flow in the Mokelumne River." In support of this contention, defendants rely on two decisions that held that the specific dams at issue in those cases were not subject to the discharge permit requirements because they did not "discharge pollutants," i.e., "'add' pollutants from the outside world to" navigable water. *See National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir.1988); *Gorsuch*, 693 F.2d at 174–75. These cases are inapposite here because the Penn Mine facility *does* "discharge pollutants" as that term is defined by the Act and relevant regulations.

In both *Consumers Power Co.* and *Gorsuch*, plaintiffs sought to compel dam operators to comply with the discharge permit requirements of the Clean Water Act. In *Gorsuch*, plaintiffs argued that dam-induced water quality changes caused by the impoundment and release of water were a "discharge of pollutants" within the meaning of the Act.[2] 693 F.2d at 161. Plaintiffs in *Consumers Power Co.* argued that the destruction of aquatic life by a dam's turbines and the release downstream of the remains were a "discharge of pollutants" within the meaning of Act. In both cases, the court held that the dams at issue did not "discharge a pollutant" because the dams did not *add* pollutants "from the outside world." *Consumers Power Co.*, 862 F.2d at 584; *Gorsuch*, 693 F.2d at 174–75. Neither case categorically exempts all dams from the discharge permit requirements of the Clean Water Act.

This case clearly is distinguishable from *Gorsuch* and *Consumers Power Co.* because the Penn Mine facility does not pass pollution from one body of navigable water into another. Rather, the source of pollution added to the Mokelumne River is "surface runoff that is collected or channelled by" defendants from the abandoned mine site. Such surface runoff is expressly listed under the definition of "discharge of a pollutant" contained in the regulations. *See* 40 C.F.R. § 122.2 ("Discharge of a pollutant means ... additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man").

In this case, defendants have admitted that acid mine drainage from the abandoned mine site is channelled into the Penn Mine facility and collects in the Mine Run Dam Reservoir. District Answer ¶¶ 18, 24; Board Answer ¶¶ 18, 22. Defendants also admit that "water and drainage collected in Mine Run Dam Reservoir had, from time to time, passed over the spillway or through the valve into the Mokelumne River and Camanche Reservoir." District Answer ¶ 21. *See also* Board Answer ¶¶ 18, 21, 22. These admissions, in

1. The court in *Gorsuch* noted that the pipes and spillways of dams are "point sources" under the Act, and therefore subject to the Act's discharge permit requirements:

> The pipes or spillways through which water flows from the reservoir through the dam into the downstream river clearly fall within [the] definition [of a 'point source'], and the EPA has required NPDES permits for the discharge of grease, oil, or trash through the outlet works of a dam.

Gorsuch, 693 F.2d at 165 n. 22.

2. "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

turn, conclusively establish that defendants "discharge a pollutant" from the Penn Mine facility within the meaning of the Clean Water Act, making them subject to the Act's permit requirements.

B. *Have defendants raised a genuine issue of material fact so as to preclude summary judgment for the Committee?*

[3] Defendants also argue that a material issue of fact exists as to whether there is an "addition of pollutants," making improper the district court's grant of summary judgment. Specifically, defendants rely on evidence that the acidity of water flowing into the Mokelumne River through the Penn Mine facility is not greater now than it was before the dam was constructed. In effect, defendants contend that they are liable under the Clean Water Act only if the facility produces a net increase in the acidity of the surface runoff compared to the acidity of the runoff before the facility was constructed.

This argument misapprehends the focus of the Clean Water Act. The Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act categorically prohibits any discharge of a pollutant from a point source without a permit. 33 U.S.C. §§ 1311(a), 1342(a); *Consumers Power Co.*, 862 F.2d at 582. Thus, the factual issue raised by defendants concerning the historical level of pollution compared to the current level of pollution is not material to the resolution of the Committee's claim, and therefore does not preclude summary judgment on the issue of liability.

Defendants have already admitted that acid mine drainage is channelled into and collects in the Penn Mine facility, and then is released over the Mine Run Dam's spillway or through its valve into the Camanche Reservoir and the Mokelumne River. Consequently, they have admitted to each of the elements needed to establish liability under the Clean Water Act. Defendants have (1) discharged a pollutant (i.e., collected and channeled surface runoff containing acid mine drainage into the reservoir and then added the polluted runoff); (2) into navigable waters (i.e., the Mokelumne); (3) from a point source (i.e., the dam's spillway and valve); (4) without a discharge permit. *See Gorsuch*, 693 F.2d at 165. Because the statute does not require the Committee to show that a greater level of pollution enters the Mokelumne now than was the case before the Penn Mine facility was constructed, the district court properly granted judgment in the Committee's favor on the issue of liability.

C. *Are actions taken by regulatory authority to prevent or reduce discharges subject to the Clean Water Act's permit requirements?*

[4] Defendants also argue that "the State cannot be held liable [under the Clean Water Act] for the activities which it has performed pursuant to its regulatory responsibilities." Although they concede that no case has so held, they contend that analogous cases under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") *do* lend support to their argument.

As the district court pointed out, in the cases cited by defendants, the absence of governmental liability under CERCLA rests squarely on express statutory exemptions. *See* Order at 34–35 & n. 32 (citing 42 U.S.C. §§ 9607(a)(1) & (2), and 42 U.S.C. § 9601). The Clean Water Act contains no such exemption. Given the absence of *any* statutory authority to exempt the Board or District from liability under the Clean Water Act, the district court did not err in finding that defendants are liable under the Act.

D. *Does the Eleventh Amendment immunize the Water Board from liability under the Clean Water Act?*

[5] The Water Board argues that "the District Court could not consider the construction that took place prior to the filing of the lawsuit because of Eleventh Amendment considerations." However, the Committee seeks only prospective equitable relief, which is not barred by the Eleventh Amendment. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104–05, 104 S.Ct. 900, 910, 79 L.Ed.2d 67 (1984) (citing *Ex Parte Young*, 209 U.S. 123, 155–56, 28 S.Ct. 441, 452, 52 L.Ed. 714 (1908)). Furthermore,

none of the authorities cited by defendants prohibit the district court from considering defendants' past conduct as it relates to ongoing or future violations. Thus, defendants' Eleventh Amendment argument is without merit.

CONCLUSION

We conclude that the district court properly granted summary judgment in favor of the Committee on the issue of defendants' liability under the Clean Water Act.

AFFIRMED.

FERNANDEZ, Circuit Judge, concurring:

I concur, but write separately because my position may be somewhat more narrowly based than the position of the majority.

As I understand it, the pollutants in question used to be carried into the Mokelumne River by Mine Run Creek and Hinkley Run Creek. The water from those creeks, and other water, ran across the tailings from the mines and became polluted. The creeks then carried that water to the river. The project has diverted those creeks so that they will stay clean and has captured polluted runoff so that it can be released in a more measured way. In other words, it seems that unregulated quantities of pollutants were flowing into the river and causing fish kills and the like long before EBMUD and the Board did anything at all. Those entities sought to eliminate the disasters caused by that unregulated flow and that is why the project was built. The result has been a significant improvement in the river's environment and a boon to aquatic life.

The majority appears to agree with appellee's position that the project is a point source in the sense that the Environmental Protection Agency could not determine that a NPDES permit was not required. I am not so sure. It seems to me that, given the history of this project, the EPA could properly have determined that this really is much more like the dams it dealt with in *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir.1988), and *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C.Cir. 1982), than it is like the typical point source that truly does add pollution to navigable waters. *See* 33 U.S.C. § 1362(12). If it had, we would have shown that determination great deference.[1] *See Consumers Power*, 862 F.2d at 584–85. It did not. In fact, the information before the district court and before us indicates that the EPA considers the project to be a point source, which does require a permit containing numerous onerous conditions.

Appellants earnestly argue that the EPA's approach, and that of the appellee's, will not serve the long-term purpose of bettering the aquatic environment. They indicate that it takes no genius or epopt to see what the message will be. Do nothing! Let someone else take on the responsibility. Let the water degrade, let the fish die, but protect your pocketbook from vast and unnecessary expenditures. Do not try to bring some order out of environmental chaos. In short, appellants suggest that no Odysseus or Daedalus crafted the policy which we are now asked to follow. Perhaps they are correct; I suspect they are.

Nevertheless, we are not policymakers. We must simply apply the law. The majority opinion demonstrates *that* with great clarity.

Therefore, I concur.

Steven SPAIN, Plaintiff–Appellant,

v.

AETNA LIFE INSURANCE COMPANY; Trans World Airlines Employees Benefits Plan, Defendants–Appellees.

No. 92–55547.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 7, 1993.

Decided Dec. 30, 1993.

ERISA plan beneficiary brought action against plan and plan administrator, alleging

1. One could even consider whether primary jurisdiction principles should be applied. *See United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362–66 (9th Cir.1987).

Add Water Code Section 10001.4:

The East Bay Municipal Utility District may exercise rights under its contract for a water supply from the Auburn-Folsom South Unit of the Federal Central Valley Project only to the extent that the delivery of that water supply will not cause flows in the American River from Nimbus Dam to the confluence of the American and Sacramento Rivers to be diminished below the minimum standards established by the State Water Resources Control Board in D1400 to protect beneficial uses or such future minimum standards for the Lower American River as may be established by the State Board in accordance with Division 2 of the Water Code.

Senator J. F. Greene

Robert B. Maddow
GENERAL COUNSEL
EBMUD

AMENDED IN SENATE APRIL 14, 1986

SENATE BILL No. 2458

Introduced by Senator Leroy Greene
(Coauthors: Assembly Members Connelly and Isenberg)

February 21, 1986

An act to add Section 10001.7 to the Water Code, relating to water resources.

LEGISLATIVE COUNSEL'S DIGEST

SB 2458, as amended, L. Greene. Water facilities.

Under existing law, the approval of the State Water Resources Control Board is required for any change in the point of diversion of appropriated water.

This bill would prohibit the construction by any public or private entity of water facilities within or upstream of the Sacramento-San Joaquin Delta in order to transport high quality ~~Sacramento River,~~ American River ; or Mokelumne River water through the delta in an isolated facility where this high quality water would otherwise improve the quality of water downstream of the intake or in the delta unless the entity fully mitigates any adverse water quality effects upon any other water supplier which supplies water for drinking purposes to at least 100,000 people, as specified.

Vote: majority. Appropriation: no. Fiscal committee: ~~yes~~ *no*. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 10001.7 is added to the Water Code, to read:

10001.7. No public or private entity shall construct water facilities within or upstream of the Sacramento-San Joaquin Delta in order to transport high quality

~~Sacramento River,~~ American River ; or Mokelumne River water through the delta in an isolated facility where this high quality water would otherwise improve the quality of water downstream of the intake or in the delta, or both, unless the entity fully mitigates any adverse water quality effects upon any other water supplier that supplies water which is used for drinking purposes by at least 100,000 people and which obtains or receives water from the delta or from a water source downstream from the intake of the isolated facility.

- not bldg an intake in this scope
- downstream is not a Canal-type term relates to river diversion

- adverse impact on Suisun Marsh conveyance fac?

mpliments of the
BMUD Resources
nning Division,
r Rights Section

DRAMATIC CHANGES IN WATER RIGHTS LAW OVER THE PAST COUPLE OF DECADES -- A STATEWIDE PERSPECTIVE

OR

"The Family Jewels are made of Paste"

Comments by Robert B. Maddow, General Counsel of East Bay Municipal Utility District, at the June 20, 1991 meeting of the Water Law Section of the Bar Association of San Francisco

Soon after I went to work for EBMUD in 1972, my boss Jack Reilley gave me a huge black binder crammed full of documents. He said something like "here is your copy of the 'family jewels'." I soon learned that he was talking about the District's water rights, and that our most important task was to protect them. In the years since then, that book has grown to two immense volumes, and literally millions of dollars and years of effort have been spent in the defense of the District's rights. Yet it is absolutely clear that those rights are far less secure now than ever before.

A couple of months ago, I spoke to Jack and to his predecessor, Hal Raines. After I described the changing nature of EBMUD's water rights and told the story about Jack giving me my book, Hal said "I think the family jewels are made of paste."

I have chosen Hal's comment as the subtitle for these remarks, and that is my major premise -- no California water right is as secure as we once thought. My remarks are not intended to be a scholarly treatise or an exhaustive review of the relevant law. Instead, I am going to offer some reflections that are meant to be provocative and a bit philosophical, based solely on my 19 years of observation in a water utility's legal department.

First, a typical lawyers disclaimer. These are purely personal observations. Second, a couple of acknowledgments. A number of ideals I will express are borrowed in whole or part from articles published in the Pacific Law Journal's excellent July 1988 Symposium edition -- particularly, the articles by Bill Attwater and Jim Markle, Cliff Schulz and Greg Weber, and one by Art Littleworth and Eric Garner. I also owe a tribute to Professor Joe Sax for his recent article in the University of Colorado Law Review, as well as his famous 1970 article in the *Michigan Law Journal.*

THREE MAJOR POINTS

I will attempt in these few minutes, to make three points, all of which contribute to my basic premise:

1. In the past few decades California has turned away from historical property

treatment of water rights and turned to a new governmental regulation and resource allocation, while simultaneously trying to learn what the Supreme Court meant when it found in 1983 that the Public Trust doctrine was fully integrated with traditional water law.

2. Both the new governmental regulation approach and the Public Trust doctrine culminate in a need for balancing, particularly by the State Water Resources Control Board, and balancing is very hard to do; and

3. Other bodies of law are also invading water rights law, at least in part because balancing is so hard and slow, and some of these are now being used to try to end-run the balancing process.

I'd like to begin by reading a couple of brief quotations:

> "It requires no extraordinary foresight to envision the great and increasing population of the state and its further agricultural and industrial enterprises dependent upon stored water -- water that is now wasted into the sea and lost

> to any beneficial use. The conservation of other natural resources is of importance, but the conservation of the waters of the state is of transcendent importance. Its waters are the very life blood of its existence."

John Shenk, Associate Justice, California Supreme Court, writing for the majority in *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 702.

> "People need Mono Lake -- not for the water that comes out of their tap, but for the recreational and ecological values, the fishing, the scenery and the greenery in an otherwise desert landscape."

Ilene Mandelbaum, Associate Director of the Mono Lake Committee, quoted in Associated Press article published in *The Alameda Times Star*, April 30, 1991.

These two quotes -- separated in time by merely 58 years -- illustrate the truly dramatic changes which have occurred in California water matters. *Gin v. Chow* was decided just after the third of the three large urban water supply import systems had commenced operations, and prior to the beginning of the construction of the state and federal systems -- the great bridges had not yet spanned SF Bay, and the word "freeway" had not yet been coined. I suspect

that there were less than 6 million Californians then. I will let you think of the contrast between that time and the California of 1991. The law of water has also greatly evolved during that time, and I think that many of the changes mirror the evolution of our State.

It is not my intention to exhaustively explore California's evolution, to brief the many significant judicial decisions, or to parcel out the many critical legislative and regulatory pronouncements which have occurred in recent years. Instead, I will attempt to characterize a few trends and patterns that I see when I try to decipher the direction in which California's water rights are evolving.

THE SHIFT FROM PROPERTY RIGHTS TO GOVERNMENTAL REGULATION

California law had recognized that water rights were a form of property right as long ago as the 1850s. By the 1920s, the state had a relatively well-developed set of legal principles which embraced both the prior appropriation doctrine and riparian rights. The peak of this property-based system was probably the Herminghaus decision in 1926, which raised serious questions about whether traditional water rights law would inhibit development of water resources to accommodate the evolution that was occurring in California. In 1928, the Constitution was amended to clarify that the principle of "reasonable use" applied

generally to all water rights, including those at issue in disputes between riparians and appropriators.

Case law in the years after the enactment of the amendment suggested that Article X, Section 2 really had made little difference in the property right nature of a water right unless a wasteful use or method of use of water occurred. As explained in some detail in Cliff Schulz's article, the cases back then stood for the proposition that in the absence of waste, senior rights holders would never be expected to sacrifice any part of their use for the benefit of a junior rights holder -- and certainly not for uses for which there was no recognized water right (e.g. instream uses). The concept of "public interest" had really not arrived on the scene yet. Water rights were safe property rights. In recent decades, case law began to change that.

In 1979, the Supreme Court made a significant change in *Long Valley* (25 Cal.3d 339) when it held that unexercised riparian rights may be limited in "scope, nature and priority" by the SWRCB in an adjudication. This case essentially stands for the proposition that in an adjudication, future riparian use is part of what Professor Sax calls a "pure appropriation" system based on the reasonable use principles.

The Joslin case in 1967 (*Joslin v. Marin Municipal Water District*, 67 Cal.2d 132) made it clear that the

purpose of use of water is also subject to review for reasonableness. The court held that there could be no property right in a use of water that was found to be unreasonable. Can there be much doubt that the owner of the gravel pit which had depended on unrestricted riparian flow ended up with a diminished property right? The *Forni* case in 1976 (*SWRCB v. Forni*, 54 Cal.App.3d 743) resulted in riparians having to share the costs and burdens of water use for frost protection with non-riparian users, in an action brought by the SWRCB on the grounds of reasonable use.

In these last two case, the private holders of riparian rights were required, in the name of reasonableness, to give up a portion of their right to the use of water for some other use which was determined to be more worthy. What is especially significant in *Forni* is that the SWRCB inserted itself into this situation and asserted that the fundamental principle of reasonableness had to prevail over privately held riparian rights. In the settlement that followed in *Forni*, riparians had to build some storage (i.e. some regulation ponds) -- an innovative approach to solving a practical problem created by application of the reasonable use doctrine.

There are literally dozens of other cases that could be mentioned at this point, but in the interests of time, I will touch on just three. First the two Supreme Court opinions in *Environmental Defense Fund v. EBMUD*

(20 Cal.3d 327 in 1977, 26 Cal.3d 183 in 1980) made it clear that the law had evolved to the point where reasonable use principles also apply to rights obtained via a water supply contract with the United States. Subsequent developments in this litigation produced a similar result regarding the applicability of the public trust doctrine to contract rights.

The principle that water rights may face modification if necessary to serve some other purpose is perhaps most clearly enunciated in *U.S. v. SWRCB* (1986) 182 Cal.App.3d 82, most commonly referred to as the "Racanelli Decision." The Court made it unmistakenly clear that the SWRCB could -- indeed, *MUST* -- modify appropriative rights if necessary to protect water quality standards set for the Delta. Essentially all water rights are "subject to call", as Professor Sax puts it, for maintenance or restoration of natural functions of downstream waterways such as the Delta. Since this decision was handed down, no water right has the degree of security that may once have been assumed.

The Supreme Court's 1983 public trust doctrine (*National Audobon Society v. Superior Court*, 33 Cal.3d 419) contributes further to this lack of security. The Court said that even the most secure appropriative right -- a license -- was subject to re-evaluation to consider the adequacy of the protection for those uses included within the public trust. How that reconsideration is to be done, and at whose

expense, was not specified. This case suggests that a double-barreled form of jeopardy exists for existing water rights; both Article X, Section 2 and the public trust doctrine can lead to review and re-evaluation of what may once have been thought of as a secure property right.

Finally, in my view it is also significant to note that the SWRCB has now institutionalized the shift to a governmental regulation system of water rights. A new staff unit was created recently to investigate and act on compliance with their rights. Among the primary tools available to this new staff organization are Article X, Section 2 of the Constitution and the public trust doctrine.

BALANCING

Both Racanelli and Audobon provide that the SWRCB (or the courts, which have been held to have concurrent jurisdiction) has the difficult task of balancing between conflicting and competing claims to water. In Racanelli, the Court attempted to lay out a road map for the Board to follow as it sorts through the incredibly complex tasks of balancing among the many beneficial uses of Delta water and the waters of its tributaries. In Audobon, the Court gave less guidance. It is significant that in the years since these two critical decisions were handed down, not very much balancing has taken place. The trial in Audobon was recently completed. The American River litigation resulted in a 4-year reference proceeding before the SWRCB and a subsequently

2-month Superior Court trial. And of course there is the seemingly endless saga of the Bay-Delta proceedings.

I submit that the dearth of the progress in the balancing of competing interest is due at least in part to the fact that such balancing is *HARD* to do. There really is very little statutory guidance. The SWRCB, which is supposed to possess the necessary expertise, is understaffed. Quantification -- even definition -- of the competing uses is extremely difficult and complex. Due to the concurrent jurisdiction, Board decisions may well be followed by court trials, making some commentators wonder if the process will ever end. And given the fact that changed circumstances may result in a need for rebalancing, these commentators may be right -- if we ever get to the end of a true balancing process, we may have to start all over again, just like painting the Golden Gate Bridge.

The result, I submit, is that existing rights have less security than before. Their status as vested property rights have changed, because they are clearly subject to governmental intervention and regulation. The various methods of reconsideration are not yet clearly defined, and there may be multiple forums and expensive proceedings in which water rights holders will have to defend their actions and the systems built in reliance on those rights.

OTHER BODIES OF LAW HAVE INTRUDED

It is clear that there are environmental problems related to some existing water rights or water project operations, and some of those problems are believed to need immediate action. There is also no question but that the balancing process is slow. Some advocates of change are impatient and want action that is faster than the water rights system appears to allow. It has also been made clear that water rights holders and project operators know that they have a big stake in winning balancing cases, and are willing to invest significant time and resources. As a result, some advocates of change are turning to other laws in search of means to achieve their goals. Some of the vehicles they have discovered are statutes which do not include balancing processes.

One of the obvious examples is the Endangered Species Act. Recent press accounts have described environmentalists' concern about the report that the federal government is considering both biological and economic factors while deciding on a habitat protection plan for the spotted owl. This concern would appear to be well-founded if one reads the Act and relevant cases, because the ESA only allows consideration of biological issues. Translate that factor to the operations of the large water projects in California and think about the winter run Chinook salmon and the Delta smelt. The ultimate impact of ESA listing of any species affected by Delta or Delta tributary operations remains to be seen.

Similar comments can be made about Fish & Game Code Section 5937 and 5946. The litigation concerning the eastern Sierra operations of the Los Angeles Department of Water and Power is instructive. The Court of Appeal has held that under the facts and relevant law, instream flows have an absolute priority to the water of the streams from which Los Angeles have an absolute priority to the water for municipal and industrial use. There are other instances in which civil litigation has been threatened or initiated under this system of statutes. There is even one instance in which a criminal prosecution was initiated (unsuccessfully) against a water rights holder under this body of law. A few days ago an action was filed alleging violations of Section 5937 and of the public trust which involved a novel theory -- that the water right licensee/permittee holds any money made by selling water used in derogation of the public trust for the benefit of the enforcers of the trust -- in this case, a small citizens group.

Under another statutory system, there has been assertions that when the Department of Fish & Game conducts certain types of streamflow studies and files the results with the SWRCB, the burden of proof shifts to the water right holder to overcome a presumption that the flows advocated by the Department are necessary for protection of fish resources. Such a shift would be a departure from the traditional protection afforded to vested water rights.

Future legal developments under this statutory scheme (Public Resources Code Section 10000 - 10004) will need to be watched with care.

CONCLUSION

I have attempted to indicate that the holder of a water right in California -- any water right -- now faces uncertainty created by the retreat from traditional property right status, the further uncertainty of the ambiguous and seemingly interminable balancing process, and the knowledge that there is an increasing number of legal avenues by which water rights may be attacked or undermined without any opportunity for balancing the interests of the uses to which the water has been put.

Even though water rights may be less secure than their owners may have previously thought, they are still the "family jewels" of the water systems they support. Water right holders probably have no choice but to fight to defend them, even though the jewels may in fact be "made of paste." I suppose this bodes a period of "full employment" for water rights attorneys, engineers, and biologists, but in the larger view, it means a period of increasing ambiguity and uncertainty about the security and stability of California's water systems, as well as the communities they serve.

GOOD LUCK!

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